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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-661

JOSEPHINE GOSS, *et al.*,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit, entered in the above-captioned matter on July 18, 1973.

Opinions Below

The *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit, and the concurring opinion of Judges Weick and Miller, are unreported and are reprinted at pp. 1a-6a of the Appendix to this Petition. The opinion of the United States District Court for the Eastern District of Tennessee is reported at 340 F. Supp. 711, and is found in the Appendix to this Petition at pp. 7a-25a.

Prior reported opinions in this case are as follows: 186 F. Supp. 559 (E.D. Tenn. 1960), *modified and aff'd,*

301 F.2d 164 (6th Cir. 1962), *rev'd in part*, 373 U.S. 683 (1963); 305 F.2d 523 (6th Cir. 1962); 270 F. Supp. 903 (E.D. Tenn. 1967), *aff'd* 406 F.2d 1183 (6th Cir. 1969); 320 F. Supp. 549 (E.D. Tenn. 1970), *remanded*, 444 F.2d 632 (6th Cir.), *immediate relief denied with instructions to issue mandate*, 403 U.S. 956 (1971).

Jurisdiction

The opinion and judgment of the Court of Appeals were entered July 18, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does a dual school system convert to unitary status by taking "some" affirmative action to desegregate "some" of its schools, while failing to take "all necessary [and feasible] steps" to eliminate schools of racial compositions substantially disproportionate to that of the entire system?

2. May a district court permit a dual school system, which instituted "neighborhood school zones" virtually identical to its prior dual zoning as a means of desegregation and which therefore remains substantially segregated, to maintain those zones on the ground that redrawing them to increase desegregation would require pupil transportation which the school district has not heretofore provided?

3. Do natural or man-made barriers, such as ridges, highways, and railroad tracks, which in large measure coincide with racially segregated housing patterns, relieve a

school board of its constitutional obligation to desegregate schools which remain virtually all-black and schools whose racial compositions are substantially disproportionate to that of the city's total school population?

4. In a dual school system which is 18% black, and which is under a constitutional mandate to convert to a unitary system, may the continued maintenance of nine heavily black schools, which together enroll 59% of all black pupils in the district, be permitted consistent with this Court's language in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971) that under certain circumstances, "some small number" of one-race schools is constitutionally permissible?

Constitutional and Statutory Provisions Involved

This case involves the application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Statement

This is the third appearance of the Knoxville, Tennessee school desegregation case before this Court. See 373 U.S. 683 (1963); 403 U.S. 956 (1971). Although a detailed history of the proceedings in this lawsuit is impracticable here, we sketch the major events below:

This litigation commenced in 1959, challenging Knoxville's classic dual school system "planned and operated in conformity with the principle of segregation" (Answer to

Complaint).[1] In 1960, the district court approved a schedule calling for grade-a-year transition from dual overlapping to single zones, subject to a minority-to-majority transfer provision.[2] In 1962 the Court of Appeals for the Sixth Circuit ordered the pace of the plan accelerated but rejected challenges to the transfer feature.[3] The following year, this Court granted review on the transfer issue alone and held it was an unacceptable part of a desegregation plan.[4] A subsequent appeal to the Sixth Circuit from the district court's order on remand was cut short when the school board's counsel told the Court of Appeals that all overlapping zones and all racially discriminatory practices would be eliminated by the 1964-65 school year.[5]

In 1967 the plaintiffs filed a Motion for Further Relief which alleged that the Knoxville public schools were still segregated. The district court denied relief, approving the existing transfer regulations and refusing to examine the attendance zone lines on the ground that they had been approved implicitly by the Sixth Circuit in 1962 and by this Court in 1963.[6] Despite continuing and substantial school segregation in Knoxville, the Court of Appeals affirmed this ruling in 1969.[7] It said that the existence of

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[1] 14,425 A. 30 [Citations in the form "—A.—" refer to the various reproduced appendices in connection with appeals before the Sixth Circuit in this cause; each is identified by the number of the case in the Court of Appeals. Citations in the form "—a" refer to the appendices to this Petition.]

[2] 186 F. Supp. 559 (E.D. Tenn. 1960).

[3] 301 F.2d 164 (6th Cir. 1962).

[4] 373 U.S. 683 (1963).

[5] See 270 F. Supp., at 908.

[6] 270 F. Supp., at 913.

[7] 406 F.2d 1183 (6th Cir. 1969).

severely racially imbalanced schools in a historic dual system did not establish the need for further corrective action, but remanded the case for retention of jurisdiction with the suggestion that the school board consider changes to promote integration.

Following this Court's decision in *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), plaintiffs again filed pleadings in the trial court seeking to end segregation in the Knoxville public schools. In 1970 the district court ruled that, except for a few problems,[8] Knoxville had a "unitary school system."[9] While plaintiffs' appeal from this decision was before the Sixth Circuit, this Court decided *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). The Knoxville case was sent back to the district court for reconsideration in light of *Swann*; the Court of Appeals declined to examine the record or to pass upon plaintiffs' contentions although it did instruct the district court that immediate action was not required.[10] Plaintiffs sought extraordinary relief at the close of the 1970 Term from this Court, which was denied. However, this Court instructed that the Sixth Circuit's mandate be issued forthwith and that constitutionally required changes could not be delayed, citing *Alexander, supra*.[11]

Once again, extensive hearings before the district court were held. Again, relief was denied by the district court, which ruled in 1972 that Knoxville's "neighborhood" school

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[8] Loose administration of transfer rules which defeated integration, and continuation of unique grade organization and attendance zoning patterns at an adjacent white high school and black junior high school.

[9] 320 F. Supp. 549 (E.D. Tenn. 1970).

[10] 444 F.2d 632 (6th Cir. 1971).

[11] 403 U.S. 956 (1971).

zones were "reasonably drawn" even if they did not achieve desegregation, and that the system was therefore unitary.[12] The court accepted modest changes in pupil assignments proposed by the school board and rejected a proposal offered by plaintiffs' educational expert witness to desegregate the entire system by using the same tools approved by this Court in *Swann, supra* (contiguous and non-contiguous pairing, zoning and clustering, with pupil transportation).

Under the school board's plan, in 1972-73 there were forty virtually all-white, and nine more-than-64%-black schools in Knoxville. 59% of all Knoxville black students were in these nine black schools. This result was approved by the Court of Appeals *en banc* as being within the equitable remedial discretion of the district court. Although the trial court had made no such finding, the appellate body ruled that geographic and man-made features, such as railroad tracks and highways ("matters other than 'the accident or circumstance of neighborhood'") prevented implementation of any more effective desegregation plan. The plaintiffs now seek review of that decision.

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[12] 340 F. Supp. 711 (E.D. Tenn. 1972).

REASONS FOR GRANTING THE WRIT

I

The Courts Below Have Decided Issues of Great Importance in School Desegregation Cases in a Manner Which Conflicts With Decisions of This Court and of the Courts of Appeals.

During the 1961-62 school year, shortly after the commencement of this lawsuit, Knoxville operated nine all-black schools; its total school population was nearly 23% black (72-1766 A. 1518-19). In 1971-72, prior to the district court order affirmed below, only 18% of Knoxville's students were black. But seven virtually all-black schools (enrolling more than 51% of all black pupils) remained, and three other facilities were 62%, 69% and 86% black, respectively. Following the district court's reconsideration of the case in light of *Swann, supra,* there were in Knoxville in 1972-73[13] three schools over 97% black, two 86% black schools, and three others between 64% and 72% black. 59% of all black students in the system attended this group of schools. Forty other facilities were virtually all white.

Under any definition, these are schools whose racial compositions are very substantially disproportionate to that of the entire system. Thus, despite the Court of Appeals' attempt to limit its holding to the particular facts of this case (4a), the impact of the decision is far reaching. Inevitably, judicial acceptance of a "desegregation" plan

[13] The plan approved by the district court (72-1766 A. 1532-34) did not contain projections of enrollments, and the district court's order (*id.* at 1672) did not include a reporting provision. The 1972-73 enrollment figures given in this Petition are taken from the school system's October 31, 1972 report (Forms OS/CR 101, OS/CR 102) to the United States Department of Health, Education, and Welfare. Counsel for the school board has declined to make available to Petitioners the current (1973-74) school enrollments.

which fails to employ any pupil transportation, noncontiguous zoning or pairing, and which leaves the majority of black students in segregated black schools, conflicts with controlling decisions of this Court and with holdings in similar cases by other Courts of Appeals. Only review by this Court can eliminate the uncertainty and doubt about the remedial obligations of formerly dual school systems created by the decisions below.

The district court and the Court of Appeals reached the conclusion that Knoxville was not required to employ the techniques of noncontiguous zoning and pairing, and pupil transportation, to further desegregate its schools, on different grounds. The rationale of each court is irreconcilably in conflict with school case decisions of this and other Courts.

The district court viewed plaintiffs' attempts to eliminate the remaining racially disproportionate, identifiable schools in Knoxville as efforts to achieve "racial balance."[14] It also held that "neighborhood" zoning was a sufficient desegregation device even though such zoning, superimposed upon the city's residential segregation, inevitably produced racially disproportionate schools.[15] In both respects, the district court's reasoning clashes with *Swann*. As the Court of Appeals for the Fourth Circuit recently put it (*Medley* v. *School Bd. of Danville*, 4th Cir. No. 72-2373 [August 3, 1973], slip op. at pp. 6-8):

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[14] "The entire thrust of plaintiffs' evidence and argument is to the effect that the Constitution requires defendant to create and maintain a nearly identical racial balance in each of its schools irrespective of residential patterns. Thus, the case having been remanded for reconsideration in light of *Swann*, the critical question is whether *Swann* requires such racial mixtures." (340 F. Supp., at 727-28; 23a-24a).

[15] "Knoxville's residential segregation has contributed 'to disproportionate racial concentrations in some schools,' but this is not the fault of the School Board. We do not interpret *Swann* as invalidating the neighborhood pupil assignment system." (340 F. Supp., at 729; 25a).

> . . . [F]orty-two per cent (734) of the city's 1754 black elementary school children will be enrolled in two schools with black enrollments of eighty-nine per cent and ninety-one per cent, respectively. Additionally, eleven per cent (210) of the black elementary school population will attend five schools with black enrollments of fourteen per cent or less. Counsel for the school board suggest that the plaintiffs' reliance upon the foregoing statistics in their challenge of the plan is, in effect, an insistence that each school should mirror the racial composition of the entire system.
>
> On the record in this case we do not find this characterization of the plaintiffs' position to be a valid one. . . .
>
> In the light of the history of state-enforced segregation in the Danville schools, the marked residual disparity in the racial balance of the schools under the plan of the District Court strongly suggests that the plan is ineffective to attain an acceptable degree of realistic desegregation.

The district court in this case, however, never applied the *Swann* presumption against substantially disproportionate schools; it was satisfied that no black children were assigned to 100%-black facilities, and it characterized even schools with only one white student enrolled as "integrated." See 340 F. Supp., at 717; 13a.[16]

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[16] In 1971-72, the seven virtually all-black schools had the following enrollments (72-1766 A. 1518-19):

	Black Students	*White Students*
Austin-East	693	4
Cansler	231	4
Eastport	442	3
Green	411	1
Maynard	288	10
Sam Hill	280	8
Vine	619	2

Compare 340 F. Supp., at 717; 13a.

The district court's effort to validate "neighborhood school" zone lines because they were "reasonably drawn" (340 F. Supp., at 718; 14a)—even though they did not accomplish desegregation—also is clearly in conflict with *Swann*. The extensive record in this cause amply documents the impact of the school board's school construction, transfer, faculty and pupil assignment policies over the years. The present zone lines, for example, are nearly identical to the dual overlapping boundaries the system used before this suit was commenced (72-1766 A. 89-102). And none of the schools constructed in Knoxville between 1960 and 1972 opened with an enrollment less than 90% of one race. As this Court stated in responding to a similar showing in *Swann*, "[d]esegregation plans cannot be limited to the walk-in school." 402 U.S. at 30.[17]

The grounds for affirmance advanced by the Court of Appeals likewise have been rejected in *Davis* v. *Board of School Comm'rs of Mobile*, 402 U.S. 33 (1971), and many lower court cases. The day is long past when natural and artificial boundaries such as highways, railroad yards, and rivers—which in this and other cases coincide with the boundaries of racially homogeneous areas of a district[18]—can properly be held to prevent constitutionally required

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[17] Some of the lower court decisions which have properly interpreted *Swann*, include: *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, —— U.S. —— (1973); *Dowell* v. *Board of Educ. of Oklahoma City*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972); *Cisneros* v. *Corpus Christi Independent School Dist.*, 467 F.2d 142 (5th Cir. 1972), *cert. denied*, —— U.S. —— (1973); *Clark* v. *Board of Educ. of Little Rock*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *cf. id.*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); and *United States* v. *Board of School Comm'rs of Indianapolis*, 474 F.2d 81 (7th Cir. 1973).

[18] See, *e.g.*, 72-1766 A. 336-37.

desegregation. Again, the summary provided by the Fourth Circuit in the recent Danville case is instructive:

> The nub of the problem in the Danville system is, of course, the Dan River just as Interstate 65 was the divisive factor confronting the Court in *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33 (1971). There, the interstate highway divided the metropolitan area of Mobile into definitive eastern and western sections. . . . The elementary school plan approved by the Court of Appeals did not provide for any combination of the schools on the eastern side with the predominantly white schools of the western section. . . .
>
> The situation in Danville is strikingly parallel to *Davis*. There are seven elementary schools on the north side of the river with a student population which is eighty-seven per cent white and thirteen per cent black. There are also seven elementary schools on the south side of the river with an enrollment which is fifty-four per cent white and forty-six per cent black. The over-all population of elementary students in the system is sixty-nine per cent white and thirty-one per cent black. In the light of these statistics we are of the opinion that the District Court fell into the same error as the lower court in Davis in formulating a plan which treated the two sections of the city in isolation one from the other and which resulted in a number of schools which are racially identifiable when measured by any reasonable gauge. . . . (slip op. at pp. 10-11).

Many other cases have required the affirmative disregarding of natural or other boundaries in order to effectively dismantle dual school systems. *E.g.*, *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969) (river, railroad

tracks); *United States* v. *Greenwood Municipal Separate School Dist.*, 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969) (river); *United States* v. *Indianola Municipal Separate School Dist.*, 410 F.2d 626 (5th Cir. 1969), *cert. denied*, 396 U.S. 1011 (1970) (river, railroad tracks). A judgment that such topographical features in Knoxville are such overwhelming barriers as to make *any* additional desegregation absolutely impossible must rest upon far more specific findings than appear in the opinion of the district court. *Cf. Thompson* v. *School Bd. of Newport News*, 465 F.2d 83 (4th Cir. 1972), *cert. denied*, —— U.S. —— (1973); *Medley* v. *School Bd. of Danville, supra.*

This Court over ten years ago rejected a plan from this school system "of which racial segregation [was] the inevitable consequence," *Goss* v. *Board of Educ.*, 373 U.S. 683, 689 (1963). Yet the courts below have allowed the superimposition of "neighborhood" zone lines upon a historic pattern of racial segregation in housing which existed when this suit was brought (340 F. Supp., at 716; 12a), with the equally inevitable resulting school segregation. This is inconsistent not just with *Swann* and rulings of other Courts of Appeals, but (notwithstanding the Court's disclaimer) with the Sixth Circuit's own decisions such as *Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972) and *Northcross* v. *Board of Educ. of Memphis*, 466 F.2d 890 (6th Cir. 1972), *cert. denied*, —— U.S. —— (1973), *vacated and remanded on other grounds*, —— —— U.S. —— (1973).[19] If

[19] The nature of the problem is accurately reflected in a Memphis, Tennessee newspaper editorial, which stated in part:

> At a time when Memphis is getting set for a federal court order that will mean additional school busing next fall, Knoxville has received the news that it will have no busing. . . .
> In effect, the neighborhood school system survives in the East Tennessee city. . . .
> But in both cases the issue was argued before the same appellate court. For Knoxville the Circuit Court agreed that busing

pervasive and long-standing residential segregation, or hills, railroads and traffic congestion, so completely vitiate the mandate of the Equal Protection Clause, then this Court's painstaking attempt in *Swann* to elucidate principles of general applicability was in vain.

II

The Court of Appeals Had No Basis, in Law or in Fact, for Rejecting the Desegregation Techniques Approved by This Court in *Swann*.

The last time a school desegregation decision from the Sixth Circuit was reviewed here on its merits, *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970), this Court found that the Court of Appeals had improperly substituted its own judgment for that of the district court when it declared the Memphis system to be "unitary." A similar process took place when this case was reviewed below.

As noted above, the district court rejected plaintiffs' motions for further school segregation in Knoxville on the basis of flawed legal reasoning by which the court concluded that the plaintiffs sought a "racial balancing" not required by *Swann*, and that Knoxville's zoning practices were constitutionally permissible, even though they left schools

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is "impractical." For Memphis, the court ordered plans for busing to proceed.

. . .

The differences between Memphis and Knoxville as to population and school enrollments naturally present different problems before different judges.

But principles don't change and neither does the Constitution, which leaves us wondering why busing has been ruled "impractical" in one city and necessary in another.

(Memphis *Press- Scimitar*, March 31, 1973 [Final Home Edition], p. 4).

of disproportionate racial composition, since the attendance areas were "reasonably drawn." The Court of Appeals, however, affirmed the district court's judgment on an entirely different basis.

The reviewing court said that any further desegregation had been proved completely impossible as a physical practicality:

> Furthermore, the appellee presented evidence concerning the location of highways and railroad yards in relation to prominent topographical features, matters other than "the accident or circumstance of neighborhood," from which the Court was justified in finding that no plan involving the transportation of pupils between non-contiguous zones in order to further improve the racial mix within the system would be feasible at this time. (3a-4a).

The statement cannot be supported on this record.

In the first place, the district court never made any such finding. Its opinion does contain a lengthy description of the City of Knoxville (340 F. Supp., at 713-14; 9a-10a), based mostly on the trial court's personal observation rather than upon the record. But the only finding to which the trial court comes is "that the geography in Knoxville is substantially more complex than that found in *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33 (1971)." Given the trial court's approach to the question whether *any* further desegregation was legally required (see pp. 8-10 *supra*), of course there was no reason for the court to reach issues regarding practicalities of particular remedies.

Furthermore, there is simply no evidence in this record from which the district court could have made the sort of

judgment described by the Court of Appeals. The use of pupil transportation as an integral part of a desegregation plan is as feasible in Knoxville as it was in Charlotte,[20] Mobile,[21] Nashville,[22] or Memphis.[23] Over 6000 Knoxville pupils were transported to classes by school bus in 1971-72 (72-1766 A. 723). The only impracticality of pupil busing for desegregation in Knoxville is the school board's resistance to it. Plaintiffs' educational expert witness prepared a plan which, by using pupil transportation and noncontiguous zoning and pairing, desegregated every Knoxville school (black enrollments would vary from 8% to 39%). But the Board instructed the expert it retained *not* to use busing—and even rejected rezoning proposals, which he had recommended to increase desegregation, which did not call for busing (72-1766 A. 407, 585-86).

The focus of the school board's defense in the trial court was its claim of *financial* inability to implement an effective desegregation plan requiring pupil transportation—a claim held legally insufficient by the Court of Appeals (4a).

By resting its holding upon factual findings which the district court did not make,[24] and which the record herein

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[20] *Swann, supra.*

[21] *Davis, supra.*

[22] *Kelley, supra.*

[23] *Northcross, supra,* 466 F.2d 890.

[24] It is interesting to observe that in 1952 the same district judge found the busing of black students *from another school system* into Knoxville to attend a [still] all-black school not merely feasible, but desirable:

> . . . In spite of the extra effort and extra expense involved, the State of Tennessee through its servants, the Anderson County defendants, is not only trying, but is succeeding in its effort, to furnish these Negro students educational advantages equal to those furnished to white students. The riding of a bus by the student plaintiffs is a small contribution upon

will not support, the Court of Appeals makes a mockery of the "equitable remedial discretion" which it purports to uphold (5a). Surely this Court in *Swann, supra,* did not mean to vest in federal courts the discretion to deny substantive constitutional rights by approving utterly inadequate remedies.[25] Surely the breadth of discretion reaffirmed in *Swann* does not justify a finding that a school district which transports 6000 children to segregated schools cannot bus a single additional pupil to bring about desegregation.

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their part and that of their parents toward the success of this effort, too small to be regarded as a denial of constitutional rights.

(*McSwain* v. *County Bd. of Educ.*, 104 F. Supp. 861, 870-71 [E.D. Tenn. 1952]). As the Fifth Circuit has aptly put it,

Barriers which did not prevent enforced segregation in the past will not be held to prevent conversion to a full unitary system.

(*Henry* v. *Clarksdale Municipal Separate School Dist.*, 433 F.2d 387, 394 [5th Cir. 1970]).

[25] The Court of Appeals implies that the black schools in Knoxville are only "a small number . . . [and do not indicate] that a dual system exists" (3a). This overlooks the fact of Knoxville's small black population, and the fact that even under the old dual system, there were only nine all-black schools. There are still nine schools of substantially disproportionately black composition in the Knoxville system.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Nos. 72-1766, - 1767

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPHINE GOSS, et al.,
Plaintiffs-Appellants,
v.
THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET. AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed July 18, 1973.

Before: PHILLIPS, Chief Judge; WEICK, EDWARDS, CELEBREZZE, PECK, MCCREE, MILLER and LIVELY, Circuit Judges.

Phillips, C. J., Edwards, Celebrezze, Peck, McCree and Lively, JJ., joined in the opinion of the Court. Miller, J., (p. 6) filed a separate concurring opinion in which Weick, J., joined.

PER CURIAM. This appeal was heard by a panel of the Court on February 12, 1973 and affirmed with a per curiam opinion filed on March 29, 1973. Appellants' petition for rehearing was granted, and a rehearing in banc was held, without further oral arguments, on June 6, 1973. Under Rule 3(b) of this Court, the previous opinion and judgment were vacated.

The history of this case, which has now been in litigation for more than thirteen years, may be found in the District Court's opinion. See *Goss* v. *Board of Education*, 340 F. Supp.

711 (E.D. Tenn. 1972). When it was last before this Court, the case was remanded "for further proceedings consistent with *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 and other relevant Supreme Court opinions announced on April 20, 1971." *Goss* v. *Board of Education*, 444 F.2d 632, 640 (6th Cir. 1971). In remanding we declined to set a timetable within which Knoxville must conform to what is directed by these Supreme Court opinions, and noted that –

> *Swann* (1971) fixes no fromulae for what must be done or what will be acceptable in efforts to arrive at a better racial mix in the schools. It does, however, lay on school authorities the duty to take some affirmative action toward improvement. While the existence of some all black or all white schools is not struck down as per se *intolerable*, school authorities will have to justify their continuance by something more than the accident or circumstance of neighborhood. Consideration of pairing of school zones, contiguous or non-contiguous, should be given; arrangement of new construction so as to further desegregation will be a legitimate objective, not to the detriment, however, of the discharge of school authorities' total and overriding responsibilities. 444 F.2d at 638.

Following remand, an evidentiary hearing was held. In the summer of 1971, on the basis of consultation with Dr. Charles Trotter, a professional educator employed as Director of the University of Tennessee School Planning Lab, the Knoxville Board of Education made a number of changes in its desegregation plan. Among other revisions, the privilege of student transfer was severely restricted, new school pairings and zone adjustments were made and election of minority cheerleaders was assured. The amendments also provided for simultaneous closing of Cansler, a predominantly black elementary school, and Moses, a predominantly white elementary school. Dr. Trotter testified in support of this plan and introduced a pupil locator map which had been constructed by the Board of Education. The plaintiffs presented a plan pre-

pared by Dr. Michael Stolee, Associate Dean of the University of Miami (Florida) School of Education. Dr. Stolee testified in support of this plan. The District Court held that "Knoxville is in compliance with *Swann.*" We affirm this holding and remand for the limited purpose hereafter noted.

The District Court has complied with the directions of this Court as contained in the opinion of Judge O'Sullivan in 444 F.2d 632 (6th Cir. 1971). The situation before Judge Taylor upon remand from this Court was quite different from that faced by Judge McMillan in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). In this case the District Judge had two plans presented to him for further desegregation of the Knoxville School system. As his opinion demonstrates, there were a number of reasons for giving less weight to the plan offered by the plaintiffs than to the one offered by the Board of Education. As trier of the facts it was his responsibility to make judgments on the weight of evidence and credibility of the various witnesses.

While it is true that some schools in the Knoxville system will remain identifiably black or white on the basis of pupil enrollment, this is largely the result of several concentrations of blacks in the area of East Knoxville. In *Swann* the Supreme Court recognized that there are frequently concentrations of minority groups in one or more parts of a metropolitan area and the existence of a small number of racially identifiable schools in these areas is not, in and of itself, a sign that a dual system exists.

The school authorities of Knoxville have taken affirmative actions to improve the racial mix of the schools, as required by our previous decision. Furthermore, the appellee presented evidence concerning the location of highways and railroad yards in relation to prominent topographical features, matters other than "the accident or circumstance of neighborhood," from which the Court was justified in finding that no plan involving the transportation of pupils between non-contiguous zones in order to further improve the racial

mix within the system would be feasible at this time. There was evidence also of a lack of funds to purchase and operate buses. However, the financial condition of the City of Knoxville would not provide sufficient reason for failing to order the transportation of pupils if the Board of Education were found to be operating a dual public school system which required busing in order to become a unitary system.

Having found that a unitary school system exists, the District Court acted within its discretion in refusing to adopt the plaintiffs' plan which would require the busing of a large number of pupils in order to obtain a certain percentage of black students in each school in the system. As the Supreme Court said in *Swann* at page 24, "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

Appellants complain that the result in this case is inconsistent with that reached by this Court in other school desegregation cases. If the result is different, it is only because the evidence produced in the District Court required a different result. The brief answer to the principal arguments of appellants is that the proof relied upon by them in the District Court and now reviewed by this Court sitting in banc failed to establish their contentions. We do not depart from the principles enunciated by this Court in *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (6th Cir. 1972); *Kelley* v. *Metropolitan Board of Education of Nashville and Davidson County, Tennessee,* 463 F.2d 732 (6th Cir. 1972), *cert. denied,* — U.S. — (1972); *Mapp* v. *Board of Education of Chattanooga,* — F.2d — (6th Cir. 1973) and *Davis* v. *School District of City of Pontiac,* 443 F.2d 573 (6th Cir.), *cert. denied,* 404 U.S. 913 (1971).

This Court has consistently upheld the decrees of the District Judges of this Circuit when properly supported by the pleadings and evidence. An appellate court simply cannot violate this settled principle of our jurisprudence, no matter

how desirable a particular result may appear to be. The experienced District Judge who has lived with this case from its inception analyzed the evidence in great detail. His findings are supported by substantial evidence and are not clearly erroneous. As the Supreme Court, speaking through Chief Justice Burger, has recently written:

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Lemon* v. *Kurtzman* — U.S. —, 41 U.S. Law Week 4467 (April 2, 1973)

In briefs and argument it has been brought out that the population of Knoxville is shifting and that changes have occurred since the decision was reached by the District Court and will continue to occur. We decline to consider these matters in the present appeal. Appropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court. We reemphasize the holding of this Court in *Kelley* v. *Metropolitan Board of Education of Nashville and Davidson County, supra*: "Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances." 463 F.2d at 745-46.

The demand of appellants for attorney fees from the beginning of this litigation must be determined in light of the most recent Supreme Court pronouncement in *Northcross* v. *Memphis Board of Education*, — U.S. —, 41 U.S. Law Week, 3635 (June 5, 1973). This action is remanded for consideration of this issue and in all other respects the judgment of the District Court is affirmed.

No costs are taxed. Each party will bear its own costs on the appeal.

MILLER, Circuit Judge, in a separate opinion, concurring in the affirmance of the judgment of the district court, in which WEICK, Circuit Judge, joins.

I am in full agreement with the per curiam opinion insofar as it affirms the judgment of the district court. However, it is my view that the affirmance should be upon the basis of the well-considered opinion of Judge Robert L. Taylor. *See Goss* v. *Board of Education,* 340 F.Supp. 711 (E.D. Tenn. 1972). Since the district court has continuing jurisdiction of the case, it has the authority to consider any question pertaining to attorneys' fees as well as any other pertinent issue. For this reason I do not find it necessary that the case should be formally remanded to the district court.

Opinion of the District Court

Josephine GOSS et al.

v.

BOARD OF EDUCATION, CITY OF KNOXVILLE, TENNESSEE, et al.

Civ. A. No. 3964.

United States District Court, E. D. Tennessee, N. D.

March 8, 1972.

School desegregation case. The United States District Court for the Eastern District of Tennessee, 320 F. Supp. 549, with certain exceptions, denied relief sought by plaintiffs, and plaintiffs appealed. The Court of Appeals, O'Sullivan, Senior Circuit Judge, 444 F.2d 632, remanded case. The United States Supreme Court, 403 U.S. 956, 91 S.Ct. 2293, 29 L.Ed.2d 866, denied plaintiffs' motion for injunction. Thereafter, the District Court, Robert L. Taylor, J., held that where no child was excluded from any school in school system because of his race or color, and school children were assigned to schools on basis of their residence and without regard to their race, and disproportionate racial mixtures in some of schools were result of residential patterns, city was operating a unitary school system consistent with constitutional requirements.

Decree accordingly.

1. Schools and School Districts ⇐13

Evidence established that board of education had continued to comply with constitutional guidelines previously approved by the district court, the Court of Appeals, and the United States Supreme Court.

2. Schools and School Districts ⇐13

Standard to be achieved by school authorities is destruction of a system which treats children differently solely on basis of race.

3. Schools and School Districts ⇐154

Where no child was excluded from any school in school system because of his race or color, and school children were assigned to schools on basis of their residence and without regard to their race, and disproportionate racial mixtures in some of schools were result of residential patterns, city was operating a unitary school system consistent with constitutional requirements.

Avon N. Williams, Jr., Nashville, Tenn., Carl A. Cowan, Knoxville, Tenn., Jack Greenberg, New York City, for plaintiffs.

S. Frank Fowler, Sam F. Fowler, Jr., W. P. Boone Dougherty, Knoxville, Tenn., for defendants.

MEMORANDUM

ROBERT L. TAYLOR, District Judge.

This lawsuit commenced December 11, 1959, over twelve years ago. While a detailed account of its early history is set out at D.C., 270 F.Supp. 903, 904–912 (1967), a brief recitation of that history will place the issues in proper perspective.

Judicial History

On April 8, 1960, the defendant submitted a grade-a-year desegregation plan effective September, 1960. This plan was approved after an extended evidentiary hearing. D.C., 186 F.Supp. 559. That decision was modified by the Court of Appeals to require acceleration of the grade-a-year schedule. However, the Court of Appeals expressly approved the neighborhood pupil assignment system. 6th Cir., 301 F.2d 164, 168–169. The defendant amended the plan on June 25, 1962, and March 14, 1963, to accelerate the schedule.

On May 11, 1964, defendant adopted a plan for complete desegregation effective September, 1964. Each child was to be assigned to the school "designated for the district in which he or she legally resides," and that "districting [was to be] based on the location and capacity (size) of school buildings and the latest enroll-

ment studies." In order to preserve continuity of education, children whose assignment was altered by the plan were permitted to complete the grade sequence where they were before transferring to a new school. This was called the "grade-requirement" transfer.

On May 8, 1967, plaintiffs filed a motion requesting the defendant to provide an equitable distribution of all racial and socio-economic elements in the population within each school in the system. After a full evidentiary hearing, the Knoxville school system was found to be fully desegregated under the plan in effect since the school year 1963–64. D.C., 270 F.Supp. 903, 918. In that opinion, we expressed the view that:

> ". . . there is no constitutional duty on the part of the school board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance which it did not cause, nor is there a duty to solely new school sites solely in furtherance of such purpose . . . " 270 F.Supp. 903, at 916–917.

Believing our responsibility to be discharged, we struck the case from the docket. This decision was affirmed in all respects except that we were instructed to keep the case on the docket to insure future compliance with *Brown I*. 6th Cir., 406 F.2d 1183, 1191 (1969).

On November 17, 1969, plaintiffs filed a motion for immediate relief based on Alexander v. Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). At the pretrial conference, proof was limited to alleged discriminatory developments since the decision of June 7, 1967. After the evidentiary hearing, we found that the building program was consistent with the neighborhood school system approved in 1967, and that the defendant was operating a unitary system within the meaning of *Alexander*. D.C., 320 F.Supp. 549, 561–562 (1970).

This decision was on appeal when Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and its companion cases were filed. Without reviewing our decision, the Court of Appeals remanded the case on June 22, 1971 "for further proceedings consistent with *Swann . . . and the other relevant Supreme Court opinions announced on April 20, 1971.*" (Emphasis added) 6th Cir., 444 F.2d 632, 640.

Immediately thereafter, plaintiffs presented to Mr. Justice Stewart a motion for immediate relief. He denied the motion because we had not had an opportunity since the remand order "to inquire whether respondents have *failed to maintain* a unitary school system as defined in *Swann . . . and prior cases.*" (Emphasis added) His order states that if *it is found* that defendant has not "*maintained a unitary school system*, [it] must '*terminate dual school systems at once*,'" citing *Alexander*, supra. (Emphasis added)

On August 16, 1971, a pre-trial conference was held and an order entered defining the issue as whether defendant had maintained a unitary system within the meaning of *Swann*. Defendant agreed to construct a pupil locator map as suggested by the Court of Appeals. 444 F.2d 632, at 639, n. 1. The evidentiary hearing was set for September 7, 1971.

Difficulties in completing the pupil locator map caused a continuance to October 21, 1971. Plaintiffs' expert witness' inability to complete his preparation caused a continuance to December 1, 1971. Then, after three full days of testimony, plaintiffs moved for the joinder of the Mayor and City Council of Knoxville as co-defendants. The motion was granted and the hearing was recessed to permit service on the proposed new defendants. On December 15, 1971, these parties appeared by attorney, agreed to their joinder, but requested a continuance to study the record already accumulated and otherwise prepare their case. Their request was granted and the hearing resumed January 31, 1972. Com-

pletion of the hearing was delayed until February 3, because of the inability of plaintiffs' chief witness to be present before that date.

The history of this case, unlike that in *Swann*, reveals that the Court has had the full cooperation of the defendant Board of Education in the effort to satisfy the constitutional mandate of *Brown I* and subsequent Supreme Court cases.

Pupil Locator System

The pupil locator system has the capability of locating the residence of each pupil within 1000 feet of the address on his enrollment card and identifying him by race and grade level. The data used came from the initial enrollment in September, 1971. It contains the normal mistakes made in initial enrollments and does not show 2700 to 2800 pupils who live in Knox County but attend school in the City. Consequently, it is 3000 to 4000 pupils below actual enrollment. The computer print-outs used in making the maps show the number of pupils of each race, at each grade level, living within each 1000 foot square. It also shows totals and percentages for each square.

Two pupil locator maps were created from the information contained in the print-outs. For both maps a grid was superimposed on a map of Knoxville and each square given a number corresponding to one on the print-out. One map shows the total number of white pupils and the total number of black pupils living in each square and attending a City school. The other is a color schematic map that reveals the degree of racial concentration by residence within each square. In addition, three transparent overlays were prepared which show the school zone boundaries at the elementary, junior high and senior high level, as well as the percentage of blacks attending each school.

Topography

Knoxville's central business district is located at the approximate center of the City on the north shore of the Tennessee River. At that point two bridges connect South Knoxville to the business district. Apart from these bridges, South Knoxville is separated from the rest of the City by the river.

The business district is a grid of streets nine city blocks in from the river and six city blocks parallel to it. East of the business district is a basin and hill of largely uninhabited land. This land is undergoing redevelopment as the Mountain View Urban Renewal Project. At the top of the hill is the now isolated Green Elementary School. North of the district is the Southern Railway Depot and to its north is an east-west (actually southwest to northeast) four lane, divided, interstate highway (I-40). At the northwest corner of the business district is a complex rail and highway interchange. A basin containing the Louisville and Nashville Railroad (L & N) freight yards is on the west side of the business district.

The east-west interstate highway cuts the City north of the river into northern and southern sections. West of the business district this highway also carries north-south interstate traffic as I-75. At the northwest corner of the business district these highways separate. I-75 travels northwest paralleling to its east a Southern Railway track. I-40 East travels northeast paralleling another Southern Railway track to its north.

At the southwest corner of the business district the river makes a "U" shaped bend. Most of the land in this bend is owned or utilized by The University of Tennessee. A bridge crosses the river into the County at the western end of this bend. It carries the four-lane divided Alcoa Highway which is an off-shoot of the interstate. The L & N Railroad track parallels Alcoa Highway at this point west of the University. The land bordered by Alcoa Highway and the L & N on the west, the interstate on the north, the business district on the east and the river on the south is known as the Ft. Sanders-UT area.

In addition to the interstates there are six major traffic arteries emanating

from the business district to the outlying suburbs. These are: Chapman Highway (S), Kingston Pike (SW), Western Avenue (W), Central Avenue (NW), Broadway (N), and Magnolia Avenue (NE). These streets have substantially greater traffic capacity than the other streets of the City. In order to get from one outlying section to another noncontiguous section, it is usually necessary to travel to the center of the City on one of these streets, or one of the interstates, then back out on another artery. This street pattern creates intense traffic congestion in the inner city and on the main arteries.

Except for the central business district, the Mountain View project, the UT-Ft. Sanders area, and along the main traffic arteries, most of the land within the City is residential property.

Along I–40 there are twenty points where one can cross under or over the highway. Fourteen are west of the business district and six are east of it. Only three are east of the urban renewal project; whereas ten are west of the Ft. Sanders-UT area. Most of the latter are in the extreme west because of a steep ridge that parallels I–40 on its south-side, west of the Alcoa Highway interchange. The Southern Railway right-of-way appears to have restricted cross-overs in the east. I–75 North has three east-west cross-overs. Otherwise, it, and the railroad, separate the north-central and northwestern parts of the old city.

Nearly three miles out I–75 North, the highway converges with the railroad to pass through Sharp's Gap. The Gap is a break in a steep ridge that separates Inskip and Lincoln Park northeast of I–75 and separates Norwood and Lonsdale southwest of I–75. The ridge is too steep for traffic and has no roads crossing it. It extends nearly a mile southwest of the Gap in an undeveloped, rural area. This land is crossed by two narrow farm roads west of the ridge.

There is extensive undeveloped land in the western and northwestern suburbs annexed from the County in 1963. These include Rocky Hill, West Hills, Bearden, Middlebrook, Third Creek, Ridge Dale, Pleasant Ridge and Norwood. These sections are experiencing rapid residential development.

It is obvious from this data that the geography in Knoxville is substantially more complex than that found in Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); that Knoxville is geographically segmented by natural and man-made boundaries; and that outlying residential areas in the west and northwest are under-developed.

Demography

In a broad sense, East Knoxville is the area north of the river, south of the eastbound Southern Railway right-of-way, and east of the Mountain View project. In a narrow sense, it refers to the black community immediately east of the Mountain View project and south of Magnolia Avenue. The area north of Magnolia has been known as Park City. Approximately one and a half miles to its northeast lies the Burlington community. Roughly a mile due east of Burlington is the Holston Hills suburb. Southeast of Burlington and southwest of Holston Hills is an area sometimes referred to as Holston Heights. In subsequent discussion these restricted names will be intended unless "greater East Knoxville" is mentioned.

The 1970 United States Census divides greater East Knoxville into seven tracts for enumeration purposes. These tracts do not correspond to the accepted community boundaries described above. The data for each tract shows the proportion of blacks to total population in the tract as a whole. A racial mixture in a given tract is not evidence of an integrated neighborhood because it ignores neighborhood cohesiveness. Thus, the census reports provide only a general indication of residential patterns.

With this caveat, the 1970 census shows all of greater East Knoxville as having black residents. The heaviest

concentration is in the tract immediately east of the Mountain View project. It is 95% to 100% black. Adjacent tracts range from 25% to 49% black to 75% to 94% black. And, outlying tracts are 6% to 24% black to 25% to 49% black. This data indicates an all-black neighborhood in East Knoxville which extends as a narrow band into Burlington. There is a substantial black minority in both Park City and Holston Heights. Except for the northeastern extension of East Knoxville, Burlington has few blacks. The tract that encompasses Holston Hills extends west into Holston Heights. It is 25% to 49% black. There is a permissible inference that the blacks in Holston Hills are concentrated along its western edge.

The 1960 United States Census shows East Knoxville as 75% to 94% black and extending towards, but not into, Burlington. Park City and Holston Heights were 75% to 94% white. Burlington was 95% to 100% white. Since the 1960 census used fewer tracts in greater East Knoxville than did the 1970 census, a comparison of the two reports is misleading. The apparent increased black concentration in East Knoxville is probably the result of a smaller tract in the later census. Two conclusions, however, are obvious. In 1960, Holston Hills and much of Holston Heights were not within the city limits. Secondly, there has been a major expansion of blacks into most of greater East Knoxville between the two census.

In the northwest pocket created by the junction of I–40 and I–75 lies a community known as Mechanicsville. To its immediate north, and west of I–75 North, is the Beaumont community. North of Beaumont is the Lonsdale community. Beaumont and Lonsdale are separated by an industrial and rail strip along Tennessee Avenue. To Lonsdale's north is the southwest extension of Sharp's Ridge which separates Lonsdale from Norwood.

The 1970 census shows Lonsdale to be 50% to 74% white, and Beaumont to be 95% to 100% white. The eastern Mechanicsville tract is 75% to 94% black and the western tract is 50% to 74% black. The Lonsdale and Beaumont tracts in 1970 are the same size and have basically the same racial mixture as they had in the 1960 census. Mechanicsville, on the other hand, was 50% to 74% black in 1960. It appears that Mechanicsville's black community has increased by 27.1% in the east and 5.6% in the west between 1960 and 1970.

All other parts of Knoxville are 95% to 100% white in both the 1960 and the 1970 census reports.[1] The 1970 census shows Knoxville's population to be 13% black. Dr. Karl Taeuber, creator of a census segregation index, testified that since 1940 each census demonstrates that Knoxville has had a high degree of residential segregation.

The Board's color schematic pupil locator map, although limited to school children, shows more precisely the geographic distribution of the races than do the census maps. While consistent with the census maps, the pupil locator map reveals facts not evidenced by the census materials. First, Lonsdale is racially segregated. Its western half is predominantly black, and its eastern half is predominately white. Second, most of Beaumont has a slight black minority. Third, most of the eastern Mechanicsville tract is predominately white.[2] Fourth, north-central Knoxville, the pocket between I–75 North and I–40 East has a black minority, albeit less than 5%. Fifth, the bulk of Holston Hills is all-white; only its western edge has black

1. The business district and the Mountain View project area have so few residents that their racial mixture is insignificant relative to the other census tracts.

2. This apparent discrepancy with the census data is explained by the fact that the predominately white pupil locator grid squares have few students and the predominately black squares have many. This situation demonstrates a serious shortcoming of all these maps: They fail to correlate racial distribution with population density.

residents. Sixth, isolated black children are scattered over the rest of the City.

The preliminary 1970 census found 174,587 residents of Knoxville and 276,293 residents of Knox County. Testimony indicates that East Knoxville has 11,500 black residents, Mechanicsville has 6,500 and Lonsdale has 6,000.

The 1963 annexation tripled the size of Knoxville from 21 to 77 square miles. Of the 22,005 households in the annexed areas in 1970, 21,873 were white. On a household basis, between 1960 and 1970, Knoxville's black community was reduced from 16.7% to 11.8% of the total population.

Some of the black movement into greater East Knoxville was caused by the displacement of 1080 black households from the Mountain View project area. Over half of these households were relocated in public housing projects in East Knoxville. Most of the remaining household units moved east towards Burlington.

The following conclusions can be reached from the preceding population data: (1) the black population of Knoxville is a small proportion of the total population (13%); (2) Knoxville's black population is residentially segregated into three geographic areas; and, (3) except for the expansion of the East Knoxville black community, essentially identical concentrations existed at the first hearing of this case in 1960.

Urban Renewal is a federal program which attempts to rebuild an area with 50% or more substandard structures that are beyond rehabilitation. These projects are overseen by the Department of Housing and Urban Development (HUD) and the Knoxville Housing Authority (KHA). KHA's role in these projects is limited to land acquisition, relocation of residents, public improvements and approval of private redevelopment plans.

The Mountain View project, as previously mentioned, is in the redevelopment stage. Fifty-four acres of this project area are designated for 400 FHA 236 apartments for low and moderate income tenants. The one-bedroom apartments will rent for $115.00 per month. Two hundred units are under construction and will be available for occupancy around March, 1972. Construction of the remaining units will commence when the weather breaks this spring. The convenient location of these apartments relative to the business district is the basis for the prediction that they will attract white moderate income tenants as well as black tenants. A predominately white but reasonably integrated neighborhood is expected to evolve.

Execution of a new urban renewal project, the Morningside project, began June 30, 1971. This project area is just east of the Mountain View project between the river and Magnolia Avenue. It contains 355 acres, 1000 household units, and is 95% black. The goal of this project is redevelopment of the neighborhood for the people who already live there. It is expected to remain predominately black.

The existence of these projects creates a fluid residential situation in East Knoxville which precludes accurate prediction of future patterns.

Changes in School Enrollment Patterns

The overall racial composition of the Knoxville schools ten years ago, the year following annexation and the present school year is:

Year	Total	White	Black	Percentage Black
1961–62	20,478	15,852	4,626	22.1%
1963–64	39,409	34,019	5,390	13.6%
1971–72	34,876	29,109	5,767	16.5%

These enrollment figures reveal several facts. Annexation nearly doubled total enrollment and reduced the overall proportion of blacks by 8.5%. Since annexation the system has lost 4,533 pupils, or 11.5%, of its annexation enrollment. This loss reflects the departure of 4,910 white pupils (14.4% of annexation white enrollment) and the gain of 377 black pupils. The net effect is a 2.9% increase in the proportion of blacks in the City system.

This year the Knox County schools have a total enrollment of 23,702. Since annexation the County system has gained 6,066 pupils. Its average annual gain for this period (658 pupils per year) contrasts with the City system's average annual loss (567 pupils per year). This corroborates the testimony of witnesses that the City system is losing pupils through out-migration to the County. Since annexation, the proportion of blacks in the County system has remained around 1% while the proportion in the City has increased from 13.6% to 16.5%. Further, since desegregation of the County schools in 1965–66, the actual number of blacks in that system has decreased.

In 1960–61, out of forty-one schools in the City system there were 23 schools in which all the pupils were white and 10 in which all pupils were black. There were thirty black children, or 0.6% of the black enrollment, attending the eight integrated schools. In that year there were no schools with integrated staffs. That was the first year under the grade-a-year plan approved by the Court.

In 1965–66, out of 65 schools there were 23 schools in which all pupils were white and 9 schools in which all pupils were black. There were 2648 black children, or 45.6% of the black enrollment, attending 33 integrated schools. In that year, there were 11 schools with integrated staffs.

In 1970–71, out of 64 schools, there were 17 schools in which all pupils were white and no schools in which all pupils were black. There were 6,019 black children, or 100% of the black enrollment attending 47 integrated schools. That year found 51 schools with integrated staffs.

This year, 1971–72, out of 64 schools, there are 16 schools in which all pupils were white and no schools in which all pupils were black. There were 5767 black children, or 100% of the black enrollment, attending 48 integrated schools. All schools have integrated staffs.

This record is indicative of the Knoxville School authorities' effort to comply with the judicial directive to desegregate. It is in sharp contrast with the situation in Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U. S. at 7, 91 S.Ct. at 1272, 28 L.Ed.2d 554 where all parties agreed that the system "fell short of achieving the unitary school system that [Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), and its companion cases] require." The desegregation plan in that case had a "free transfer provision" which rendered the plan illusory. (Free transfer provisions were declared unconstitutional in Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).) Knoxville does not have a free transfer provision.

The Existing Neighborhood Pupil Assignment System

Beardsley Junior High and Cansler Elementary School are next door to each other in Mechanicsville; Maynard Elementary is four blocks east of Cansler; Moses Elementary is four blocks east by south of Maynard, or nine blocks from Cansler. Cansler has a 98.3% black enrollment; Maynard has a 94.6% black enrollment; and, Moses has a 79.8% white enrollment. This reflects the residential composition of their respective zones.

Because of the relative proximity of these schools, they have excess classroom space. However, in addition to its regular programs, the Moses plant contains a pre-school program and the Van Gilder School.[3] Cansler has a pre-school program and a special education program in addition to its regular program. Maynard has a nursery program. Due to these special programs there is only one vacant classroom at these three schools. Beaumont Elementary School is seven

3. Van Gilder is a special program for children with emotional learning blocks. It needs additional classroom space.

and a half blocks north by west of Maynard, six and a half blocks northeast of Cansler, and ten blocks northwest of Moses. It has an extensive severely mentally retarded program (149 pupils) and no vacant classrooms. The nearest elementary school to Beaumont's north is Lonsdale, one mile to its northwest. Beaumont is 13.3% black. Sam E. Hill Elementary is three blocks southwest of Lonsdale. It is 96.6% black, while Lonsdale is 13.1% black. The extreme proximity of these schools and residential segregation in their zones necessitate some disparity in their relative racial composition. Under the circumstances the zone lines for these schools are reasonably drawn and the racial composition of each school corresponds to the composition of its zone.

Turning to East Knoxville, the Mountain View Elementary plant is eight blocks east of Green; Eastport is five blocks northeast of Mountain View and thirteen blocks east by north of Green. These three school sites have been in use for as long as there are school records, that is, back into the last century. Throughout the past decade each of these schools has had a predominately black enrollment. Eastport has always had a black enrollment. From 1965–66 to 1969–70 Green experienced a heavy enrollment loss due to the Mountain View project displacement. In 1970–71 the Mountain View school closed and Green's enrollment jumped by 203 pupils. However, this year its enrollment is down 82 pupils.

Moving into greater East Knoxville, Park Lowery Elementary School serves the Park City neighborhood. It is six blocks north by west of Eastport and a mile northeast of Green. Fair Garden Elementary School serves the Burlington area. It is sixteen blocks (1⅔ miles) northeast of Park Lowery and eighteen blocks northeast of Eastport. Robert Huff Elementary School serves the Holston Heights area and was annexed from the County. It is one mile south by east of Fair Garden and one and a third miles due east of Eastport on the southeastern City limits. Robert Huff will be replaced by the new Sarah Moore Green School on the latter's completion. The construction site is one thousand feet northwest of the present Robert Huff plant. Chilhowee Elementary School was also annexed from the County. It serves Holston Hills and is one and a half miles northeast of Fair Garden. Each of these schools enrolled only white children when this lawsuit began. Yet each has since acquired a substantial black minority as shown below on a percentage basis:

	Park Lowery	Fair Garden	Robert Huff	Chilhowee
1961–62	1.1	0.2	—	—
1962–63	2.5	1.0	—	—
1963–64	1.8	2.9	0	0
1964–65	2.7	4.2	0	0
1965–66	40.9	27.7	4.4	0
1966–67	50.8	50.0	9.2	0
1967–68	58.9	63.0	15.1	1.4
1968–69	65.3	77.7	15.7	4.1
1969–70	66.8	79.1	21.6	6.4
1970–71	66.0	83.4	27.0	10.8
1971–72	69.3	86.0	27.8	18.7

The increasing percentage of black children in these schools is consistent with the changes in residential patterns in their respective zones as shown by successive census reports. With one qualification [4], these figures show an influx of blacks in Park City and Burlington. The expansion has leveled off in Park City but is continuing in Burlington. There has been a slow but steady movement of blacks into Holston Heights. More recently the movement has extended into Holston Hills and last year became greatly pronounced.

In summation, the elementary school zones in greater East Knoxville are reasonable in light of the relative distances between these schools. The racial composition of each school reflects both the present residential composition of its zone

4. Despite complete desegregation in 1964–65, the "grade-requirement" transfer, then permissible, prevents realistic correspondence between enrollment figures and residential distribution for that year. The next year is a more realistic base.

and the changes within the zone for the past seven years.

The County school system does not have a junior high school system. Therefore, Robert Huff and Chilhowee, which were annexed from the County, have eight grades instead of six grades found in schools that have always been City schools. As a result Vine and Park Junior High Schools, which serve the rest of greater East Knoxville, have a higher proportion of blacks than they might otherwise be expected to have. Park is 64.4% black and Vine is 99.8% black. These schools are seven blocks apart. Both are between Green and Eastport.

East and Austin Senior High Schools were fed by Park and Vine Junior High Schools, respectively, until their consolidation in 1968–69. The combined enrollment figures for these two schools were 51.2% black in 1961–62 and remained around that level until 1965–66 when it rapidly rose to the 99% level. More significant is the fact that combined enrollment for these schools declined from 1196 in 1961–62 to 697 in 1971–72.

The pupil locator map discloses that 291 more white children attending City schools live in the Austin-East Senior High School zone than attend schools within the zone. The shortage appears to be at the senior high level. Many of these children have vocational transfers to Fulton, the system's only comprehensive vocational high school. The Fulton zone is 2% to 3% black, yet the school's enrollment is 10.2% black. This discrepancy is clearly attributable to vocational transfers. Vocational transfers, however, do not account for all the shortage. There are indications that the balance can be found at Holston High. No evidence was introduced to show whether school registration procedures include a determination that the registrant resides within the appropriate attendance zone. It is possible that transfer procedures can be circumvented. The evidence is clearly insufficient to explain the situation.

Knoxville has been on a residential pupil assignment system basis as long as there has been a public school system in Knoxville. This situation is in contrast with the Charlotte-Mecklenburg County system, which only adopted a neighborhood system in 1965.

The facts just enumerated demonstrate that the racial composition of each school with predominately black enrollment is consistent with the previously approved neighborhood pupil assignment system. Of the thirty schools with enrollments in excess of 99.0% white children, twenty-five are in South Knoxville or the annexed suburbs. The other five schools are located in neighborhoods without black residents. The remaining twenty-seven schools have varying racial mixtures and are located in neighborhoods that reflect their respective mixtures. Thus, the racial composition of the schools corresponds to the residential patterns within each school zone. A substantial increase in the racial mixture of nearly every school would require massive bussing of children.

The Latest Changes: Effective, September, 1972

In the summer of 1971, the Board, in an effort to comply with the new guidelines laid down in Swann v. Charlotte-Mecklenburg Board of Education, amended its desegregation plan to establish the following policies:

1. Authorized the creation and maintenance of a pupil locator map.

2. Established a policy of assigning faculty and supporting staff, insofar as is administratively sound, to have the faculty of each school reflect the racial balance of the school system as a whole.

3. Revised transfer policy to permit only two classes of transfers: (1) vocational or special education transfers and (2) majority to minority race transfers. These transfers must be renewed annually and will be honored only so long as the transfer basis remains valid.

4. The following zone adjustments were made:

(a) Pair Sam E. Hill and Lonsdale Elementary Schools;

(b) Move the severely mentally retarded program at Beaumont and the pre-school program at Moses to Cansler; and close the regular program at Cansler by dividing its regular pupils between Beaumont and West View (West View is 100% white);

(c) Move the regular program at Moses to Maynard and expand the special education program at Moses;

(d) Organise Beardsley as a two-year junior high and Rule as a four-year senior high serving the present Rule-Beardsley attendance zones;

(e) Move the Austin-East zone line further east;

(f) Pair the vocational programs at Austin-East and Fulton;

5. Assured election of minority race cheerleaders.

The Board has agreed to and will pay transportation expenses of all students who transfer under the majority to minority transfer provision. See 402 U.S., at 26–27, 91 S.Ct. 1267, 28 L.Ed.2d 554.

Although the proposed zone adjustments were adopted prior to creation of the pupil locator map, the map shows that they will improve the racial mixture in the affected schools. The Board declined to alter the elementary zones in East Knoxville until the new Sarah Moore Green School, now 15%–20% complete, is ready for occupancy. The racial balance of the affected neighborhood is in a state of flux. Further, the impact of the 400 residential units in the Mountain View project area is unknown at the present time. These uncertainties preclude a meaningful zone adjustment in East Knoxville at this time.

The Trotter Plan

After adopting these zone changes, the Board retained Dr. Charles Trotter, a professional educator[5], to prepare a school zone map from the pupil locator data that would achieve the maximum racial mix without bussing children. Except for two major differences, his zone map is essentially the same as that adopted by the Board. Dr. Trotter zoned 150 white pupils living in Norwood to Rule High School. These children are presently being transported to West High by the County under the Local Sales Tax Agreement. Assistant Superintendent Bedell testified that this suggestion was not adopted because of distance and safety factors. In order to get from Norwood to Rule it is necessary to make two crossings of an interstate highway at a cloverleaf with no crosswalks. In addition, if zoned to Rule these children would live less than one and one-half miles from the school and would not be eligible for County transportation.[6] The other major difference is that Dr. Trotter adjusted zone lines in East Knoxville based on present pupil location data.

Dr. Trotter testified that the residential concentration of blacks in Knoxville into three geographically well-defined areas made it impossible to obtain the same degree of racial mixing in each school with a neighborhood pupil assignment system. He said that improvement

5. Dr. Trotter is a school curriculum and buildings expert who is employed as Director of the University of Tennessee School Planning Lab. The Lab assists school systems that are planning new programs or designing new buildings. He is presently evaluating another system's curriculum in light of a recent bussing order. Dr. Trotter lives in Maryville, Blount County, Tennessee.

6. The City-County Local Sales Tax Agreement reads in pertinent part:

"After the adoption of the sales tax by the referendum, the County will, without charge to the City, provide transportation by bus to and from school for all pupils living in neighborhoods which were furnished such transportation by the County School System prior to . . . annexation . . . and who live one and one-half (1½) miles or more from the schools attended. The County will not be required to transport pupils to any school outside the particular school zone in which such pupils live or to which they are assigned in a contiguous school zone."

on his plan would require massive cross-town bussing.

The Stolee Plan

Plaintiffs' expert, Dr. Michael Stolee [7], believes that a school system whose enrollment is 16.5% black must have a 10% to 30% black enrollment in each school in order to be desegregated. Since only eight schools in Knoxville meet this test, he concluded that Knoxville has a segregated school system. He said that it is not possible to have a good desegregation plan without bussing. Dr. Stolee introduced his plan which he asserts will effectively desegregate the Knoxville public schools.

Doctor Stolee has made some twenty school desegregation studies, forty additional school desegregation consultations, and is presently serving as a consultant to the Legal Defense Fund of the National Association for the Advancement of Colored People in three other school desegregation cases. (The Legal Defense Fund is representing plaintiffs in this case.) Throughout the three days defendants presented their proof in chief, Dr. Stolee sat within the bar and consulted with plaintiffs' counsel, as did Dr. Bedell who sat with defendant's counsel.

Dr. Stolee was provided a copy of the computer print-outs of the pupil locator data for use in preparing his plan. He said he did not use this information because it did not include the County children who attend City schools under provisions of the City-County Local Sales Tax Agreement.[8] Instead he relied on the current enrollment figures for each school and used existing elementary school boundaries for boundaries in his plan. The Court has studied the pupil locator data and realizes that a plan based on that information would require time-consuming, tedious, and exhausting effort. Dr. Stolee's failure to use this data substantially reduces the weight of his testimony.

On the elementary level, Dr. Stolee left alone the six schools that meet his test of an integrated school. The other elementary schools are divided into seven groups. Each of these "clusters" drew its attendance from the existing neighborhood zones of the schools assigned to the cluster. Each cluster included one school with a predominately black student body. Some of the clusters have contiguous zones, and others have non-contiguous zones. Each cluster has one school designated as a grade-center which serves all children at the designated grade level who reside in a cluster zone. Children at the designated grade level who do not reside within the grade-center's neighborhood zone are bussed to the grade center. Children who reside within the grade-center's neighborhood zone but are not at the designated grade level are bussed to other schools in the cluster. Dr. Stolee declined to suggest a basis for deciding to which school in the cluster the latter children should be assigned. Since only 16.8% of the total elementary school enrollment is black, and this is residentially concentrated, black neighborhood schools had to be selected as grade-centers if unnecessary bussing were to be avoided.[9]

7. Dr. Stolee is Associate Dean of the University of Miami (Florida) School of Education. He also is a professional school desegregation witness and consultant. His income from the latter employment is restricted to 20% of the salary paid him by the University of Miami. This condition of employment restricts his fees for outside consultations and court appearances to between $5,000 and $6,000 each year, exclusive of expenses. He testified that he expects $4,000 for his efforts in this case.

8. Section 3 of the agreement provides that a child living outside the corporate limits of the City may attend a school annexed by the City in 1963 tuition free, if the school is within two miles of his residence or if he would have attended that school had it remained a part of the County School System.

9. Dr. Stolee's original elementary school plan designated all the grade-centers as sixth grade centers. His amended plan designates three of them as first grade centers. The stated reason for the change was to avoid discrimination against black first graders by making them do most of the bus riding.

Opinion of the District Court

Doctor Stolee testified that 3684 elementary school children would be bussed under this plan. He later qualified this statement to indicate that this was only 75% of the elementary pupils who would be attending schools outside their neighborhood zone. He said that 25% of these 4912 children would make their own transportation arrangements.

He stated that these children would have to be bussed from one to six miles. On cross-examination, he admitted that he had not laid out bus routes or computed the mileage. Using Dr. Stolee's map, the Court located the most feasible routes between the most distant schools in six elementary clusters. It then measured the travel distance in each case. They were as follows: Norwood to Eastport, 7.9 miles; Shannondale to Fair Garden, 10.4 miles; Sterchi to Park Lowery, 8.8 miles; Rocky Hill to Maynard, 10.0 miles; West Hills to Cansler, 8.6 miles; Anderson to Green, 6.6 miles. These distances substantially exceed those estimated by Dr. Stolee.

More significantly we found only one feasible bus route in each of these cases. In each case, Knoxville's street patterns compel routing on the major traffic arteries at the hours of maximum traffic congestion. The Court is of the opinion that out of the aforementioned routes only the West Hills-Cansler route can be traveled in rush hour traffic in less than thirty minutes. The State Department of Education's regulations limit transit time for elementary school children to periods under thirty minutes.

The Stolee plan assigns junior high pupils to particular schools by a feeder system. Each junior high school zone encompasses specific, current elementary zones. Three of these zones are non-contiguous. Dr. Stolee testified that 990 pupils would have to be bussed in these three zones. In other words, 1320 children will attend a junior high school in a non-contiguous zone with 25% making their own transportation arrangements.

The Stolee plan converts Whittle Springs Junior High into a seventh grade center and pairs it with Christenberry Junior High. The Whittle Springs-Christenberry Junior High zone encompasses the non-contiguous Eastport Elementary zone. It also encompasses the "contiguous" Inskip Elementary zone. Sharp's Ridge separates Inskip from north-central Knoxville where Whittle Springs and Christenberry are located. This fact and the route that would have to be traveled from Inskip necessitate bussing from that neighborhood. (Inskip is 4.1 miles from Whittle Springs and 5 miles from Christenberry. Eastport is 5 miles from Whittle Springs and 3.2 miles from Christenberry.) Despite these facts, Dr. Stolee testified that no "additional transportation" would be needed in this zone. Since the Eastport children would have to be bussed to these schools, that statement is probably an oversight.

Regarding the bussing of children from Inskip to these schools, Dr. Stolee apparently assumed that the County could be compelled under the City-County Local Sales Tax Agreement to bus these children to Whittle Springs and Christenberry. This assumption is a legal conclusion which he is not competent to make.[10] Mr. Lewis Howard, an attorney,

All the testimony indicates that bus riding is harder on younger children than it is on older children. The amended plan substantially increases the total number of first graders that would have to ride a bus for the sole purpose of reducing the number of black first graders who would have to ride buses.

10. The language that probably would be controverted reads: "The County will not be required to transport pupils to any school outside the particular school zone in which such pupils live or to which they are assigned in a contiguous school zone." The Whittle Springs Christenberry zone lines as drawn by Dr. Stolee give the appearance of encompassing a contiguous Inskip community. However, a close examination of a map reveals that Inskip is not contiguous to the rest of the zone. Sharp's Ridge separates Inskip from Lincoln Park to its immediate south. (There are no direct

who in his capacity as City School Board member, testified that the Local Sales Tax Agreement is an illusive agreement that has been the subject of many differing interpretations since its inception. Since Dr. Stolee was present for Mr. Howard's testimony and had a copy of the transcript of it, he should have known that his assumption was questionable. Of course, he might not have relied on this assumption, in which case he overlooked the obvious need to bus children from Inskip.

Under the Stolee plan, the Beardsley Junior High zone is five miles long, with the Beardsley plant at the easternmost end. The children living in the western Cedar Grove and Pond Gap Elementary zones would have to be bussed to Beardsley. Dr. Stolee testified that no new transportation would be required in this proposed zone. This opinion is based on the legal conclusion that the County's obligation to bus children in the Cedar Grove and Pond Gap areas would require the County to bus these children to Beardsley if the zone lines were changed. This conclusion is questionable since the Local Sales Tax Agreement is easily interpreted as limiting the County's obligation to bus to those schools nearest the eligible child's residence. (Cedar Grove School is 1.9 miles from Bearden Junior High and 4.9 miles from Beardsley. Pond Gap is 1.4 miles from Bearden Junior High and 2.5 miles from Beardsley.)

In addition, Dr. Stolee apparently overlooked the need to bus children living in the Perkins Elementary zone to Beardsley. The Cansler Elementary zone, containing Beardsley, is separated from the Perkins zone by an interstate highway and railway interchange. For reasons of safety, these children must be bussed to Beardsley should they be assigned there. The County has no obligation to provide this bussing under the Local Sales Tax Agreement.

Because they were annexed from the County, Spring Hill and Alice Bell schools house grades 1–8 and do not feed into a junior high school. Since these schools zones have no black residents, at the junior high level these schools would be 100% white under the Stolee plan. Since these schools will not meet Dr. Stolee's definition of desegregated schools, his testimony that his plan would effectively desegregate the Knoxville schools is erroneous.

At present both the South and the Young High School plants house grades 7–12. Dr. Stolee would convert these schools to 9–12 senior high schools and send South Knoxville 7th and 8th graders to Vine Junior High. This change would compel the bussing of 1400 children across the Henley Street Bridge, on the most congested traffic artery in Knoxville (Chapman Highway) and through the crowded central business district at peak traffic hours. This would require twenty-four 60-passenger bus loads twice each day. In addition, fourteen 60-passenger bus loads of elementary children would have to take the same routes at about the same times twice each day. If Dr. Stolee's assumption that 25% of these children will obtain their own transportation is correct, the traffic problem will only be compounded. Some of these children can expect to spend over two hours each day commuting.

The other junior high schools with noncontiguous zones are Gresham and Bearden. Some 300 youngsters would have to be moved from Fair Garden 8.8 miles to Gresham in extreme North Knoxville (Fountain City). Some 160 would have to be moved from Maynard 6 miles west to Bearden Junior High.

Doctor Stolee testified that his proposed Tyson Junior High School zone would not require transportation. Moses Elementary School, which is zoned to Tyson in the Stolee plan, is 1.8 miles from Tyson. Children from the Moses zone

road routes from Inskip to the rest of the proposed zone.) Inskip children would have to travel at least a mile through other zones before they could reach the Whittle Springs-Christenberry zone.

must cross under the interstate highway at one of its most heavily used exits which provides direct access to the University of Tennessee. These distance and safety factors make bussing from Moses to Tyson highly advisable if not necessary under the Stolee plan. There are similar needs for limited bussing in the Rule Junior High and the Park Junior High zones proposed by Dr. Stolee because they encompass residental areas that are accessible only by dangerous routes.

On the senior high school level, the Stolee plan has three non-contiguous zones: Bearden draws from Maynard (10 miles), Central draws from Fair Garden (10 miles), and Fulton draws from Eastport (3.2 miles). He stated, in effect, that 562 senior high students would have to attend school outside their neighborhood zone.

The Stolee plan's proposed zone lines for West High eliminate portions of the present West zone that are receiving transportation from the County under the Local Sales Tax Agreement. Further, the proposed West zone encompasses the present Cansler and Moses Elementary zones. The latter schools are 5.4 miles and 4.6 miles, respectively, from West. Dr. Stolee's testimony that no additional transportation would be required in the West zone is clearly incorrect.

After careful study of the Stolee plan, we are convinced that Dr. Stolee grossly understated the actual amount of bussing and the distances involved in his plan. The many serious oversights in his plan and his failure to utilize the pupil locator data prevent his plan from serving as a workable alternative to the Board's plan. It is evident that Dr. Stolee did not devote the time to his plan necessary to do a professional job. This failure combined with his manifest interest in this type of case seriously undermines his credibility as an expert witness. If implemented his plan would disrupt the Knoxville School system and the lives of parents and children in many households.

In addition to the patent weaknesses in the Stolee plan, Dr. Bedell pointed out some of the shortcomings of the plan. A number of these are significant. They are as follows:

(1) The plan discriminates against black high school students without private transportation who are bussed out of their neighborhoods and who want to participate in after-school extra-curricular activities such as athletics.

(2) The plan did not consider plant capacity. It would require one hundred additional classrooms at some schools while underloading others.

(3) Implementation of the plan would require legal arrangements between the City Board of Education, the County Board of Education, the City Council, the County Court and the State Department of Education. Negotiation of these arrangements could take many months.

(4) By removing the ninth grade from certain junior high schools, the plan deprives these schools of state funds for guidance counselors.

Faculty and Principal Assignments

Faculty employment is based on the applicant's qualifications and the system's need for special skills. There is no position in the system for which race is a consideration. A large number of black teachers have been hired over the past few years. However, there is a shortage of black elementary school teachers.

The Board's resolution of July 26, 1971, to assign teachers to achieve a racial balance in each school consistent with the ratio for the system as a whole was accomplished by transferring some 180 teachers. On the elementary level this was accomplished by lottery.

Subject area certification of teachers prevented assignment by lot on the senior high level. These assignments were made by Dr. Bedell's office. Shop instructors, athletic instructors and band directors were sheltered because their skills are in short supply and their programs for the 1971–72 school year were already underway. Consequently, at the senior high level only academic instructors were considered for reassignment. Some experienced English teachers at Austin-East

were sheltered because otherwise that school would have no English teacher with more than two years' experience.

Beardsley is the only school in the system without a study hall. This requires a unique teaching assignment at that school that, in turn, prevented achievement of the desired racial ratio at that school. Vine gets a large number of welfare pupils from low income housing projects in its zone. Some of its teachers were sheltered because of their skill in student control.

For these reasons, the desired faculty ratio has not been achieved at some schools. Dr. Bedell's office is continuously trying to correct these imbalances as rapidly as possible without damaging the continuity of the departmental program in any school. Some improvement has been made since the chart was made. Dr. Bedell testified that the faculties of each school in the system, except three, are within two faculty members of having a racial balance identical to the overall faculty composition for the entire school system.

The defendant's principal hiring practice is to promote from within. All faculty and principals receive the superintendent's newsletter where all vacancies are advertised. Those interested in a specific vacancy must apply for the position.

Under a private tenure act, a principal's salary is tied to the size of the school he supervises. If there are no vacancies at schools with the same classification, he may be locked into a particular school. When a principal is transferred to a school at a lower classification, the act requires that his salary be maintained at the higher level. This situation has obvious inequities.

Austin-East had a white principal until last year when he requested a transfer. Since only blacks applied for that vacancy, it is now held by a black. No black applied for the recent vacancy at Holston. Until it was closed, Bell House school had a predominately white student body and a black principal. Fair Garden has a white principal and a predominately black student body. Blacks have refused offers of principalships at predominately white schools.

In the opinion of the Court the faculty of each school in the system is effectively desegregated.

Transfer Policy

Lewis Howard, a Knoxville attorney and member of the defendant Board of Education, testified that the transfer policy is a problem throughout the system because of frequent unhappiness with individual school situations unrelated to race. Dr. Fred Bedell, Assistant Superintendent in Charge of Personnel and Development, testified that one of the past abuses of the transfer system has been its use as a disciplinary threat. He said that majority-to-minority racial transfers are now a matter of right. The Board is encouraging them and will provide bus fare to these transferees. No child is excluded from any school for reasons of race.

Defendant has made its transfer records available to the plaintiffs. Dr. Bedell gave a group of parents permission to inspect the transfer records. They informed counsel for plaintiffs that although they had conducted only a partial check, they had found thirty-four non-vocational transfers from Austin-East for this school year. Dr. Bedell's staff verified thirty-one of these transfers. Because the present transfer policy was adopted in July, 1971, it is possible that these transfers for the 1971–72 year were approved before that date. Apart from this partial check by third parties, plaintiffs made no effort to introduce any competent evidence relating to the Board's transfer policy. There is no credible evidence that the Board's transfer policy is being used to promote segregation.

The Board introduced copies for the transfer requests from Austin-East for the past three school years. Dr. Stolee testified that these requests demonstrated that the transfer system had been used to promote segregation. These requests do not indicate the applicant's race, and the bulk of them are checked

"disapproved." It is not understood how Dr. Stolee could reach his conclusion from this exhibit.

Extra-Curricular Activities

The extra-curricular activities in the City schools are widely varied but chiefly are athletic or musical. Participation is on the basis of interest and ability. There are no racial restrictions in extra-curricular activities. There is athletic competition between predominately black schools and predominately white schools. Obtaining minority race cheerleaders at mixed schools has been a matter of recent concern. Last spring the Board took action to assure minority representation.

The Building Program

Of classrooms with no specific program assignments, there are forty-eight vacant regular classrooms. These occur in South Knoxville and the inner city. They are in buildings built in former population centers of the City that have experienced a steady out-migration to the suburbs. These areas do not have the population density they once had. Enlargement of these zones will not help because it merely reduces the size of the adjacent zone, thereby passing the vacancy problem to the next school. This is the reason many special programs are located in inner city schools. There are two alternative solutions to the problem. Some inner city schools can be abandoned and new ones built at more appropriate locations. This would require voter approval of a bond issue. Or, the City could establish a transportation system to haul children in from the overcrowded suburban schools. The City does not have funds to establish such a system. Under the terms of the Local Sales Tax Agreement, County transportation in the annexed areas is not available for bussing children to the inner city schools.

The new Central High was completed and opened at the beginning of this school year. It is located one-half mile east of the old Central High. The new building was necessitated by the condition of the old plant. It is in an annexed suburb and cost $5,000,000.00. The old Central plant is now Gresham Junior High.

The new Bearden High was built to replace the old plant which had many portable classrooms. It is in an under-developed, rapidly growing area that needed and still needs additional classroom space. It also serves some 400 County students. The old Bearden plant has been filled with some 1000 junior high pupils. The elementary schools in the area, Rocky Hill and West Hills, are overcrowded and use portable classrooms. The new Bearden High plant made possible the creation of a separate junior high at the old plant. They are in the annexed suburbs.

Northwest Junior High School was constructed to relieve the pressure on its feeder elementary schools which had continued to serve grades 1 through 8 since their annexation from the County. It serves annexed suburbs.

The new Sarah Moore Green School, now under construction, is intended to replace Robert Huff and relieve the pressure on Fair Garden and Eastport. Robert Huff is now at capacity. Eastport and Fair Garden are overcrowded. The reasons the Green School is not used to relieve this overcrowding are that special programs decrease the space actually available there, and Green's inaccessibility creates problems.

Mr. Lewis Howard testified that the Board has considered site selection as a means of desegregation. Their policy is to build schools where the children live in order to avoid constructing a "white elephant." Areas where few children live are threatened with changes rendering them unsuitable for schools and which may compel abandonment of school facilities. Schools in areas that are losing population can be fully utilized only if children are transported to them from other areas. The Board does not have a transportation system nor does it have funds to acquire one.

He further testified that existing school facilities are located between recently constructed suburban schools and the interior schools where black children

live. The latter are not operating at capacity; adjacent schools are at capacity; and the peripheral suburban schools are overcrowded. Under these circumstances, the Board feels a priority obligation to build schools in the suburbs to relieve overcrowding there. Until all children have adequate classroom space, site selection cannot be used effectively to increase integration.

The Board has not used school site selection or school abandonment to promote or perpetuate segregation.

Busing

Investigation disclosed that creation of a racial balance in each school approximating the ratio for the system as a whole would require bussing 8,000 to 10,000 children in eighty buses. If the pick-up points were the childrens' homes the annual cost will exceed $500,000.00. If the pick-up points are neighborhood schools the annual cost will exceed $300,000.00. The Board does not own any buses or any bus maintenance facilities.

The City school system is facing a serious financial crises. It has recently experienced large deficits in its operating budget and realistically anticipates another large deficit this fiscal year. The system has exhausted available revenue sources and stands to lose additional state and county funds because of continuing enrollment decline. Board Member Lewis Howard testified that the Board is not able to provide a proper instructional program with current budgetary limitations. Since 90% of the Board's budget is consumed as salary costs, the creation of any new programs or projects without independent funding would necessarily reduce the faculty size and further reduce the quality of education offered the children.

Swann Distinguished

This case has been remanded for reconsideration in light of *Swann* and its companion cases. An examination of the *Swann* opinion reveals several important factual differences from our case.

Goss was commenced in 1959 and Knoxville began to desegregate in 1960–61. Prior to that time Knoxville used a neighborhood pupil assignment system and has, with Court approval, continued to do so. Knoxville does not have a pupil transportation system. Knoxville permits only vocational and majority-to-minority racial transfers. In contrast, *Swann* was not commenced until 1965. Prior to that time, Charlotte had a large pupil transportation system [12] and did not purport to assign pupils on the basis of geographically drawn zones. Charlotte's 1965 desegregation plan instituted geographical pupil assignment for the first time and at the same time allowed almost unlimited transfer privileges. Cf. Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968).

In 1967, we held that Knoxville had been operating a unitary system since 1964–65. That decision was affirmed by the Court of Appeals in 1969. In 1970, we held that Knoxville had maintained a unitary system within the meaning of *Alexander* since 1967. In contrast, all parties in *Swann* agreed that in 1969 the Charlotte-Mecklenburg system fell short of achieving the unitary system required by prior cases. In 1969, Charlotte had segregated athletic competition, a segregated school transportation system and a racially segregated faculty. Knoxville has none of these characteristics.

Conclusions of Law

[1] The great preponderance of the evidence shows, and the Court finds, that defendant has continued to comply with the constitutional guidelines previously approved by this Court, the Court of Appeals, and the United States Supreme Court. The entire thrust of plaintiffs' evidence and argument is to the effect that the Constitution requires defendant

12. Prior to the District Court's bussing order, Charlotte bussed 23,600 pupils at all grade levels daily an average of 15 miles one way for an average trip of over an hour. 402 U.S., at 30, 91 S.Ct. 1267, 28 L.Ed.2d 554.

to create and maintain a nearly identical racial balance in each of its schools irrespective of residential patterns. Thus, the case having been remanded for reconsideration in light of *Swann*, the critical question is whether *Swann* requires such racial mixtures.

The opinion in *Swann* contains a statement that is clearly responsive to that question:

> ". . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. *The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.*" (Emphasis added) 402 U.S., at 24, 91 S.Ct. at 1280.

Although that statement refutes plaintiffs' argument, it does not disclose the standard defendant must meet. That standard is expressed at other points in the opinion:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; *it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.*" (Emphasis added) 402 U.S., at 23, 91 S.Ct. at 1279.

The Knoxville School Board has not excluded any pupil from any school, directly or indirectly, on account of race. Knoxville's residential segregation has contributed "to disproportionate racial concentrations in some schools," but this is not the fault of the School Board.

We do not interpret *Swann* as invalidating the neighborhood pupil assignment system.

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*." 402 U.S., at 31, 91 S.Ct. at 1283.

Earlier the opinion refers to *Green* as holding:

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' 391 U.S., at 437–438, [88 S.Ct. 1689, at 1694, 20 L.Ed.2d 716.]" 402 U.S., at 15, 91 S.Ct. at 1275.

It should be recalled that in *Green* there were two separate systems in operation despite residential integration.

[2] The *Alexander* definition of a "unitary system" is best identified by Chief Justice Burger's statement in his concurring opinion in Northcross v. Board of Education, 397 U.S. 232, 236–237, 90 S.Ct. 891, 893, 25 L.Ed.2d 246 (1970):

> "The suggestion that the Court has not defined a unitary school system is not supportable. In *Alexander* . . . we stated, albeit perhaps too cryptically, that a unitary system was one 'within which no person is to be effectively excluded from any school because of race or color.' "

Another indication of the constitutional standard appears earlier in the opinion.

> "The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violate[d] the Equal Protection Clause. The remedy commanded was to dismantle dual school systems." 402 U.S., at 22, 91 S.Ct. at 1279.

As indicated by these quotations, the standard to be achieved by school authorities is the destruction of a system which treats children differently solely on the basis of race.

[3] No child is excluded from any school in the Knoxville school system because of his race or color. Thus, the Knoxville system is a unitary system within the meaning of *Alexander*. As Knoxville school children are assigned to schools on the basis of their residence and without regard for their race, the system is not a dual system as was defined in *Green*. Disproportionate racial mixtures in some of the Knoxville schools are the result of residential patterns. *Swann* is clear that the school authorities are not expected to prevent different treatment of the races outside the schools. 402 U.S., at 22–23, 91 S.Ct. 1267, 28 L. Ed.2d 554. The racial composition of the Knoxville schools is not the result of present or past discriminatory action upon the part of the School Board. Knoxville is in compliance with *Swann*. Accordingly, Knoxville is operating a unitary school system consistent with constitutional requirements.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-661

JOSEPHINE GOSS, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF OF KNOXVILLE, TENNESSEE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-661

JOSEPHINE GOSS, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL

OPINIONS BELOW

The certiorari petition correctly lists the reported opinions in this case except that it omits two reported memo decisions, 371 U.S. 811 (1962) and 319 F.2d 857 (6th Cir. 1963). It also omits the unreported three Judge per curiam

opinion of the Sixth Circuit which is set out in the appendix to this brief at Pages 1b-10b.[1] For the convenience of the Court the following additional opinions in this case are included in the appendix to this brief. 270 F.Supp. 903 (E.D. Tenn. 1967) (11b), 320 F. Supp. 549 (E.D. Tenn. 1970)(27b), 444 F.2d, 632 (6th Cir. 1971) (41b).

JURISDICTION

Jurisdictional requisites are adequately set forth in the certiorari petition (p.2).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does a dual school system become a unitary system when no school is recognizable as a black or white school by reason of the faculty and staff, quality of buildings and equipment or extracurricular activities and the Board has taken all practical steps to eliminate student bodies with a racial composition substantially disproportionate to the entire system?

2. May a school board continue to operate a neighborhood school zone system which was approved by the trial court and upheld by the Court of Appeals and became the law of the case when the time expired for further appellate procedures when the black students which are 16 1/2% of the total enrollment attend 75% of the schools, all schools are attended by white students, and the neighborhood residential pattern which causes the difference in the racial composition of the schools was not the fault of the school board?

---

[1]Citations in the form "-A-" refer to the appendix prepared in the last trial, No. 72-1766 and 72-1767 before the Court of Appeals. Citations in the form "-a-" refer to the appendix to the Petition. Citations in the form "-b-" refer to the appendix to this brief.

3. When the racial imbalance of the students in the school is the result of residential patterns which the school board did not cause and the board operates a neighborhood school zone system which achieves the greatest practical degree of actual desegregation, is the Board required by the Constitution to acquire and operate a transportation system which it does not have and cannot afford when the Plaintiffs failed to present any creditable evidence that the situation could be improved by busing?

4. When the trial judge has described the school board's plan as being "a vigorous, straightforward and expertly managed program of integration" and the court has obtained the "full cooperation of the Defendant Board of Education in the effort to satisfy the constitutional mandate of *Brown I* and subsequent Supreme Court cases" and the Negros may live in any area of the City and attend the school in their neighborhood or be transferred at school board's expense to a school in which their race is in the minority, is the Board required to bus students because of the existence of a few schools with a majority black student body?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The certiorari petition correctly lists the constitutional and statutory provisions (p. 3).

COUNTERSTATEMENT OF THE CASE

History

A concise and clear history of this long and difficult litigation from its commencement in December, 1959, until June, 1967, is given by Judge Taylor in 270 F. Supp. 903, 904-12 (12b-20b). The plan of desegregation is set out in footnote number 4. This history is brought current by

Judge Taylor in 340 F. Supp. 711, 711-713 (7a-9a). The plan of desegregation set out in footnote 4 was amended by the changes effective in September, 1972, given by Judge Taylor on pages 719-720 (15a-16a).

For the purposes of this Petition, the important history begins with the trial in May, 1967. One of the issues submitted by the plaintiffs and accepted by the Court at this 1967 hearing was "whether or not the Knoxville Public Schools System is effectively desegregated in compliance with the Fourteenth Amendment to the Constitution of the United States in relation to (1) pupil assignment (2) faculty." 270 F. Supp. 903, 911.

Judge Robert L. Taylor at 270 F. Supp. 903 held that Knoxville had achieved a unitary system and struck the case from his docket. The Court of Appeals in 406 F. 2d 1183 (6th Cir. 1969) affirmed the District Court in every respect but instructed the Court to retain the case on its docket to insure future compliance with *Brown I*. No petition for certiorari was filed so this became the law of the case.

In November, 1969 the Plaintiffs filed a Motion for Immediate Relief based upon *Alexander v. Board of Education*, 396 U.S. 19, (1969). The motion complained of gerrymandered geographic zone lines, assignment, hiring and discharge of school personnel and planning, designing, locating and construction of new schools and additions or expansions of existing schools. After another full evidentiary hearing on all aspects of the Board's plan as practiced since 1967, the District Court again held that Knoxville was operating a unitary system, 320 F. Supp. 549 (27b). The Court of Appeals in an opinion found at 444 F. 2d 632 (41b) made extended comments approving the neighborhood system developed in

Knoxville. The case was remanded for further proceedings consistent with *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) and other relevant Supreme Court Opinions announced on April 20, 1971.

The Plaintiffs filed a Motion for Immediate Relief with Mr. Justice Stewart which was denied.

Back again in the District Court the pretrial order of August 16, 1971 defined the issue to be tried as "Whether or not the Knoxville City School System is a unitary school system within the meaning of *Swann v. Mecklenburg* and related cases." (A1511) After seven days of trial the Court again held that the Knoxville School Board is in full compliance with the Constitution and is maintaining a unitary system free of the vestiges of segregation that existed prior to 1959. This opinion was affirmed in a unanimous per curiam opinion filed by Judges Weick, Miller and Lively (1b). Judge Lively filed a separate concurring opinion (9b). The Plaintiffs filed a petition for hearing en banc which was granted. The full Sixth Circuit Court of Appeals en banc unanimously approved the action of the District Court (1a-6a).

Current Plan

The essence of the present Board plan, most of which became effective ten years ago in September, 1964, is that all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System shall be eliminated and abolished. Faculty and supporting staff insofar as it is administratively sound are assigned so that the faculty of each school reflects the racial composition of the school system as a whole. Each student is assigned to the school designated for the District in which the student legally resides, subject to variations

due to overcrowding. A plan of school districting based upon the location and capacity of school buildings and the latest enrollment studies is followed subject to modification from time to time as required. Transfers are permitted only for vocational or special education classes and majority to minority race transfers. Transfers must be renewed annually and will be honored only so long as the transfer basis remains valid. Transportation at School Board expense is provided for majority to minority race transfers.

As shown by Exhibit 9 (A. 21,1520) Knoxville began its desegregation efforts in the school year 1960-61 with 22,600 students. Only 30 of the 4,978 Negro students attended mixed schools. This number increased each year until 1970-71 when all Negroes, who comprise 16 1/2% of the student body, (table on 12a) attended schools with a racially mixed student body. The number of schools with only Caucasian enrollment has steadily dropped from a high of 43 in 1963-64 to 16 in 1971-72. Every school now has a mixed staff with the black teachers in each school in about the same proportion as the students in the system as a whole (A. 27-34). Schools are not identifiable as black or white by extracurricular activities (A.42) or maintenance of buildings or equipment (A.43,1250).

Knoxville has never had a transportation system (A. 38-42). With the annexation of a large area of the County in 1963 the City and County entered into an agreement whereby the County would continue to bus the students to the neighborhood school in the annexed area in the same manner they were bused prior to annexation. As part of the desegregation plan students from the vocational wing of Austin-East are bused about a mile to the academic wing and vice versa and transportation is provided for certain severely mentally retarded students.

1971 Revision of Desegregation Plan

After the case was remanded for consideration in light of *Swann*, the Knoxville School Board employed Dr. Charles Trotter of the School Planning Laboratory at the University of Tennessee (A.46). He was asked to draw up a plan for Knoxville which would get the best desegregation of the schools and get the best mix of students without busing (A.407). Dr. Trotter drew up an extensive plan which was adopted by the Board with a couple of minor exceptions. Dr. Stolee, the Plaintiffs' chief expert, agreed that Dr. Trotter had devised the best plan possible without busing the students (A.1420-1421). Both experts agree that Knoxville had gone as far as it could in mixing the students without busing them (A.407,411,439,1420). As the Trial Judge found, the zone lines are not gerrymandered and the attendance in each school reflects the residential patterns of the community around each school. 270 F. Supp. 903, 913 (21b). He further found that the policies of the Board of Education did not cause the residential racial patterns. 340 F. Supp. 711, 728 (24a). No child is locked into a school in which his race is in the majority. This suit can be summarized in the Trial Judge's own words:

> "The Court finds that after a slow start the Board of Education has moved with commendable zeal, conscientiousness and results toward the integration of the schools and faculties in an enormously complex situation." The Knoxville plan has been ". . . a vigorous straightforward and expertly managed program of integration". 270 F. Supp. 903, 916 (24b).
>
> "The history of this case, unlike that in *Swann* reveals that the Court has had the full cooperation of the Defendant Board of Education in the effort to satisfy the

constitutional mandate of *Brown I* and subsequent Supreme Court cases." 340 F. Supp. 711, 713 (9a).

Comments on Petitioners' Statement of Case

The Petitioners assert (p. 4) that despite continuing and substantial school segregation in Knoxville, the Court of Appeals affirmed in 1969. The Statement then summarized the opinion as approving "severely racially imbalanced schools in a historic dual system". This is not a fair summary of this case. This 1969 opinion was decided before *Davis v. Board of School Commissioner's of Mobile* 402 U.S. 33, (1971) established for the first time the requirement that the Board should make every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation. This Court of Appeals decision held that the fact that certain schools were attended predominantly by Negroes did not by itself without other proof establish that the Defendant was violating the constitutional rights of the Plaintiffs. The opinion upheld the District Court but ordered it to retain the case on the docket in the event the Board of Education wished to consider some pairing of the existing schools or alterations of its plans for future construction. The Court made no suggestions or commands.

The Statement continues (p. 5) by saying that except for a few problems Knoxville's unitary system was approved. Footnote 8 which cites no authority says there were loose transfer rules and unique grade organization and attendance zoning patterns. Although the Plaintiffs made these contentions (they were denied by the Defendants) they were never able to present creditable evidence to prove their contentions. (For example, see 21a-"Transfer Policy"; 320 F. Supp. 549, 557 (35b). The Statement concludes by saying that the District Court ruled that the zones were

reasonably drawn even if they did not achieve desegregation and that the system was therefore unitary. The District Court did hold that the zones were reasonably drawn and that Knoxville had established a unitary system. It further held that Knoxville has not excluded any pupil from any school directly or indirectly on account of race. Therefore, Knoxville does have a desegregated system even though racial imbalance because of residential patterns the Board did not cause remains in some schools.

ARGUMENT

Evidence Supports Courts' Findings

The Petitioners' only complaint is that Knoxville has not been required to bus students for racial balance when other cities have. The Court of Appeals has given a complete answer to this contention.

> "Appellants complain that the result in this case is inconsistent with that reached by this Court in other school desegregation cases. If the result is different, it is only because the evidence produced in the District Court required a different result. The brief answer to the principal arguments of appellants is that the proof relied upon by them in the District Court and now reviewed by this Court sitting en banc failed to establish their contentions. We do not depart from the principles enunciated by this Court in *Northcross v. Board of Education of Memphis City Schools*, 466 F.2d 890 (6th Cir. 1972); *Kelley v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee*, 463 F.2d 732 (6th Cir. 1972), *cert. denied*, —U.S.— (1972); *Mapp v. Board of Education of Chattanooga*, —F.2d— (6th Cir. 1973) and *Davis v. School District of City of Pontiac*, 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971).

"This Court has consistently upheld the decrees of the District Judges of this Circuit when properly supported by the pleadings and evidence. An appellate court simply cannot violate this settled principle of our jurisprudence, no matter how desirable a particular result may appear to be. The experienced District Judge who has lived with this case from its inception analyzed the evidence in great detail. His findings are supported by substantial evidence and are not clearly erroneous. As the Supreme Court, speaking through Chief Justice Burger, has recently written:

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Lemon v. Kurtzman*,—U.S.—, 41 U.S. Law Week 4467 (April 2, 1973)"

Before proceeding, the Court should clearly understand that the defendants have established a unitary system under the criteria set out in *Swann*. In *Swann* the Court said that first the school itself must be looked at without the children. Can it be identified as either white or black by its faculty or staff, maintenance of buildings and equipment and extracurricular activities. Once the school cannot be so identified, then the Board has the obligation to establish the greatest practical mix of the students. This the Knoxville School Board has done.

The Petitioners argue that their evidence should produce busing in Knoxville and concludes that since the Court did not order busing, it has misapplied the law. The Knoxville plan of desegregation has never been static but from its inception in 1959 has used the techniques approved in *Swann* except massive busing. The results of this process is that no student in the system is excluded from any school because of race or color (23a-25a). In other

words, no matter where a child lives in Knoxville, he or she may attend the school nearest to his or her home. If his race is in the majority in that school, he or she may attend at School Board expense a school in which his race is in the minority. He is not locked into the neighborhood school. There is extensive evidence in the record to support the trial court's finding that the residential patterns are not the result of School Board action (24a-25a).

Petitioners' Chief Evidence

The Petitioners' chief evidence (p. 7) that busing is necessary is that seven schools are "virtually all black schools" and three others have a majority of black students. The seven schools are listed in footnote 16 on page 9 of the Petitioners' brief. This static presentation of the situation in the school year 1971-72 ignores important underlying facts.

Austin-East is the result of pairing Austin High School which was the black high school with East High School which was a white school. Cansler was closed at the beginning of the 1973-74 school year as a regular elementary school (16a). Greene is in a large urban renewal area and its racial composition in the future is uncertain (320 F. Supp. 560; 14a). The white school in the Maynard area, Moses, has been closed (16a). Sam Hill was paired with Lonsdale, a white school, beginning the school year 1973 (15a). The three remaining schools which the Petitioners do not name, are Park Lowry and Fairgarden, which were white schools in 1959 (See Table 14a), and Beardsley Junior High School which now houses both white and black junior high school students for the Rule High School zone (16a).

The Petitioners state on page 10 that the present zone lines are nearly identical to the zone lines prior to this

suit. Since the school Board has developed a neighborhood school plan under which the students will attend the school closest to their home, the school Board has never contented that the school zone lines will be radically changed except at the periphery of the zone and except when schools are paired and new schools constructed. The location of zone lines have been extensively litigated several times (270 F. Supp. 903, 913 (21b); 320 F. Supp. 549, 556 (34b)).

Busing Is Not Practical

The Petitioners argue on page 10 that other school districts have been ordered to bus students when there have been natural and artificial boundaries, such as highways. If this were the only evidence the School Board's case would be very weak. This evidence was only a small part of the evidence that cross-town busing is not practical in Knoxville. The evidence on this issue is extensive and complex. No attempt will be made here to review it in detail. The facts are that to achieve equal balance about two black students should attend each classroom of twenty students throughout the system. Most of the black students live in east Knoxville with Tennessee River with few bridges on the south, ridges with few cross-throughs on the north, and the major business district of Knoxville to the west. These black children must be interchanged with white children to the south, west, and north during the morning rush hour. The first problem is selecting the specific children to be transported to specific schools which is a very practical problem when 5/6ths of the Negroes must be transported (A1351-1352). There is proof in the record that substantial numbers of blacks are not prepared for cross-town busing (A851, 870-874, 1099-1100). The next problem is the inter-relationship

between the importance of the safety of the children who must walk to school between sunup and the beginning of school and between the end of school and sundown, the length of the school day and the time it takes to get from home to school and back. The Board of Education does not have a transportation system (A38-42). Children in the old city before annexation either walk to school or provide their own transportation (A40). Children in the annexed area are transported at County expense under the annexation agreement if they live more than one and one-half miles from school (A-41). Dr. Stolee, the Petitioners' chief expert, prepared a plan under which the buses for racial balance would pick the children up at the neighborhood school rather than the homes (A1391). This would mean the children in the annexed area who live more than one and one-half mile from school would ride two buses. It would also mean that children who walk to school would have to be allowed enough daylight time to get to school before they are bused across town (A720-721). The Board of Education has never contended that because of the geography of Knoxville it is impossible to bus children. It is the Board's position that because of the time factors involved, it is not practical for children to walk to school safely, then be bused to another school and get in a full day's schoolwork. There are also substantial problems in busing in urban areas as distinguished from rural areas (A 714-719).

Another major problem is one of cost. Knoxville would not only have to acquire and operate a school transportation system but it would also have to develop sixth grade centers and other centers suggested by Dr. Stolee, which involves the reorganization of the entire school system. The City of Knoxville provides about 7% of the funds to operate the Knoxville schools (A 884). The rest comes

from the County, State and Federal funds. Under the State law the City is not eligible to receive state funds for transportation (A 672, 706), so that the entire burden of this massive plan would fall exclusively on the taxpayers of the City of Knoxville. Knoxville's financial inability to bear this burden is extensively documented in the evidence. It's present tax rate is the highest permitted by its charter (A 503, 505, 548) and it is in a critical financial situation (A 504).

The Court of Appeals decision recognized that the Trial Court correctly followed *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The evidence in this record is abundant that over the years the racial composition of the teachers and staff, the quality of the school buildings and equipment, and the organization of sports and extracurricular activities have been the subject of frequent hearings. The testimony at the last hearing fairly summarized the progress to date and supports the findings of the Court that schools cannot be identified racially on these criteria. The record in this case is also abundantly clear that over the years the school Board has had the burden of showing that student assignments are genuinely nondiscriminatory and not the result of present or past discriminatory action of the Board and has carried the full burden of justifying one-race schools.

Footnote 13, page 7 of the Petition states that Counsel for the School Board has declined to make available to the Petitioners the current (1973-74) school enrollment figures. This is denied by Counsel for the Defendants and if it becomes material, they will submit an affidavit of the true facts. Furthermore, it is most unusual for information not in the record which the parties have not had an opportunity to comment upon or explain by their witnesses, to be considered on a Petition for Certiorari.

In footnote 24, page 15, the Petitioners quote from an opinion by Judge Taylor which was decided before the *Brown* decision. Under the law at that time, the Board of Education was required by the Tennessee Constitution to operate a dual system and is therefore, completely irrelevant in light of the law as it has developed after *Brown*.

CONCLUSION

For the reasons herein discussed, the Defendants submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix

Nos. 72-1766, -1767

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPHINE GOSS, ET AL.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,
Defendants-Appellees.

APPEAL from United States District Court for the Eastern District of Tennessee.

Decided and Filed March 29, 1973.

Before WEICK, MILLER and LIVELY, Circuit Judges.

PER CURIAM. This case is before us for the fifth time, and was heard by the panel after plaintiffs-appellants' motion for an en banc hearing was denied. The history of the litigation is adequately portrayed in the previous opinion of this Court reported in 444 F.2d 632 (6th Cir. 1971), and the opinions of the District Court cited therein, and need not be repeated at length here. Suffice it to say that as far back as 1967 the District Court held that Knoxville had achieved a unitary school system. 270 F.Supp. 903 at 918 (1967). We affirmed in 406 F.2d 1183 (1969). No attempt was made to obtain Supreme Court review of this decision and it became final.

A few months later the plaintiffs filed in the District Court a motion for immediate relief, grounded upon *Alexander* v. *Holmes Co. Bd. of Education*, 396 U.S. 19 (1969). The District Court conducted another evidentiary hearing and again held

that Knoxville was operating under a unitary system. 320 F. Supp. 549 (1970). Plaintiffs again appealed.

During pendency of the appeal, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and other companion cases were decided. Relying on these cases, the plaintiffs filed a motion in that appeal and in other appeals then pending, asking that we command the District Court to order the Board of Education to adopt a number of elaborate rules and directives to accomplish desegregation. These were apparently based on District Judge McMillan's order in *Swann*, with some extensions and elaborations.

In our opinion reported in 444 F.2d 632, referring to Judge McMillan's opinions, we stated:

> "The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg Counties. The broadness of their commands bespeak some motivation of reprisal. In the long history of the litigation we deal with, we find no such bitter contesting between the school authorities of Knoxville and the court, nor between the plaintiffs and the school authorities. We, therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the *Mecklenburg* rule, it by no means directed that its commands be obeyed everywhere. We, therefore, conclude that there is nothing in *Swann* (1971) that requires us to announce a fiat imposing on Knoxville the identical pattern fashioned by Judge McMillan for his case." 444 F.2d at 636.

We further stated:

> "*Swann* v. *Charlotte-Mecklenburg, supra*, [402 U.S. 1 (1971)] . . . approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. It did not, however, direct that a plan of transporting school children must be a part

The court further stated:

"In the summer of 1971, the Board, in an effort to comply with the new guidelines laid down in Swann v. Charlotte-Mecklenburg Board of Education, amended its desegregation plan to establish the following policies:

1. Authorized the creation and maintenance of a pupil locator map.

2. Established a policy of assigning faculty and supporting staff, insofar as is administratively sound, to have the faculty of each school reflect the racial balance of the school system as a whole.

3. Revised transfer policy to permit only two classes of transfers: (1) vocational or special education transfers and (2) majority to minority race transfers. These transfers must be renewed annually and will be honored only so long as the transfer basis remains valid.

4. The following zone adjustments were made:

(a) Pair Sam E. Hill and Lonsdale Elementary Schools;

(b) Move the severely mentally retarded program at Beaumont and the pre-school program at Moses to Cansler; and close the regular program at Cansler by dividing its regular pupils between Beaumont and West View (West View is 100% white);

(c) Move the regular program at Moses to Maynard and expand the special education program at Moses;

(d) Organize Beardsley as a two-year junior high and Rule as a four-year senior high serving the present Rule-Beardsley attendance zones;

(e) Move the Austin-East zone line further east;

(f) Pair the vocational programs at Austin-East and Fulton;

5. Assured election of minority race cheerleaders. The Board has agreed to and will pay transportation

> expenses of all students who transfer under the majority to minority transfer provision. See 402 U.S., at 26-27, 91 S.Ct. 1267, 28 L.Ed.2d 554." 340 F.Supp. at 719.

The Board, after adopting the zone changes, retained Dr. Charles Trotter of the University of Tennessee to prepare a school zone map from the pupil locater data that would achieve the maximum racial mix without bussing children. As to Dr. Trotter's map, the court stated:

> "Except for two major differences, his zone map is essentially the same as that adopted by the Board. Dr. Trotter zoned 150 white pupils living in Norwood to Rule High School. These children are presently being transported to West High by the County under the Local Sales Tax Agreement. Assistant Superintendent Bedell testified that this suggestion was not adopted because of distance and safety factors. In order to get from Norwood to Rule it is necessary to make two crossings of an interstate highway at a cloverleaf with no crosswalks. In addition, if zoned to Rule these children would live less than one and one-half miles from the school and would not be eligible for County transportation. The other major difference is that Dr. Trotter adjusted zone lines in East Knoxville based on present pupil location data.
>
> Dr. Trotter testified that the residential concentration of blacks in Knoxville into three geographically well-defined areas made it impossible to obtain the same degree of racial mixing in each school with a neighborhood pupil assignment system. He said that improvement on his plan would require massive cross-town bussing." 340 F.Supp. at 720.

The plaintiffs retained Dr. Michael Stolee who presented a plan which would require massive bussing of from 8,000 to 10,000 children and the acquisition of 80 busses. While Dr. Stolee estimated the annual cost of only $190,000 a year, witnesses of the Board placed the cost at from $300,000 to $500,000 per year depending on whether the school children are

picked up on the street or at schools. The Stolee plan also provided for extensive changes in the manner in which certain schools would be utilized, and for changes in equipment. No one estimated the cost of these changes.

Dr. Stolee did agree, however, that Dr. Trotter's plan was the best plan possible for mixing the students without bussing.

It was Dr. Stolee's view that a school system containing 16.5% black children should have a 10% to 30% enrollment of blacks in each school in the system in order to be desegregated. This is the quota system. He was of the opinion that Knoxville was not desegregated because only eight of its schools meet this test. He testified it would not be possible to have a good desegregation plan without bussing.

The Court found that Dr. Stolee in the preparation of his plan relied on current enrollment figures for each school and used existing elementary school boundaries. He did not use the pupil locator map which the Board provided at our suggestion although it was available to him. In this respect the Court stated:

> "The Court has studied the pupil locator data and realizes that a plan based on that information would require time-consuming, tedious, and exhausting effort. Dr. Stolee's failure to use this data substantially reduces the weight of his testimony." 340 F.Supp. at 721.

The court further stated:

> "After careful study of the Stolee plan, we are convinced that Dr. Stolee grossly understated the actual amount of bussing and the distances involved in his plan. The many serious oversights in his plan and his failure to utilize the pupil locator data prevent his plan from serving as a workable alternative to the Board's plan. It is evident that Dr. Stolee did not devote the time to his plan necessary to do a professional job. This failure combined with his manifest interest in this type of case seriously undermines his credibility as an expert witness.

> If implemented his plan would disrupt the Knoxville School system and the lives of parents and children in many households.
>
> In addition to the patent weaknesses in the Stolee plan, Dr. Bedell pointed out some of the shortcomings of the plan. A number of these are significant. They are as follows:
>
> (1) The plan discriminates against black high school students without private transportation who are bussed out of their neighborhoods and who want to participate in after-school extra-curricular activities such as athletics.
>
> (2) The plan did not consider plant capacity. It would require one hundred additional classrooms at some schools while underloading others.
>
> (3) Implementation of the plan would require legal arrangements between the City Board of Education, the County Board of Education, the City Council, the County Court and the State Department of Education. Negotiation of these arrangements could take many months.
>
> (4) By removing the ninth grade from certain junior high schools, the plan deprives these schools of state funds for guidance counselors." 340 F.Supp. at 724.

In the evidentiary hearing evidence was offered that the City of Knoxville, which is the source of the Board's funds, is in financial straits; that a $400,000 deficit in the City's budget carried over into 1972. The Mayor estimated that the School Board's budget has a deficit of about $800,000. The School Board already owes the city $600,000 and cannot pay it. Ninety percent of the Board's budget is consumed for salaries.

Davis v. *School Comm'rs of Mobile Co.*, 402 U.S. 33, 37 (1971), required the Board to provide "greatest possible degree of actual desegregation taking into account the *practicalities* of the situation." (Emphasis added.) The Board has done just that as the District Court found. The Board was

not required to wreck the educational system in order to provide for massive bussing.

One other thing should be mentioned. The District Court found:

> "The Knoxville School Board has not excluded any pupil from any school, directly or indirectly, on account of race. Knoxville's residential segregation has contributed 'to disproportionate racial concentrations in some schools,' but this is not the fault of the School Board." 340 F.Supp. at 728.

In the evaluation of the testimony of expert witnesses, we ought not disturb the District Judge's determination unless he has abused his discretion, which we do not find.

One thing which is clear from *Brown I*,[1] *Brown II*,[2] and *Swann* and related cases is that District Judges are granted wide authority and discretion to fashion equitable remedies. In following these decisions and upon careful consideration of the record, it is our opinion that the findings of fact of the District Court are supported by substantial evidence and are not clearly erroneous.

We did not say in our remand that the District Court should order bussing. In fact, we said that *Swann* did not "direct that a plan of transporting children must be a part of every new plan for improvement of the objective of desegregation." We regarded bussing as only a tool but not a mandatory tool in every school desegregation case.

We remanded for consideration in the light of *Swann*, and related cases. In Judge Taylor's well-reasoned opinion, he did exactly that and we think he correctly applied the law of those cases. Judge Taylor did carefully consider bussing and determined that it was impractical and not required.

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[1] *Brown I*, 347 U.S. 483 (1954).

[2] *Brown II*, 349 U.S. 294 (1955).

In the concluding paragraph of his opinion, Judge Taylor said:

> "No child is excluded from any school in the Knoxville school system because of his race or color. Thus, the Knoxville system is a unitary system within the meaning of *Alexander*. As Knoxville school children are assigned to schools on the basis of their residence and without regard for their race, the system is not a dual system as was defined in *Green*. Disproportionate racial mixtures in some of the Knoxville schools are the result of residential patterns. *Swann* is clear that the school authorities are not expected to prevent different treatment of the races outside the schools. 402 U.S., at 22-23, 91 S.Ct. 1267, 28 L.Ed.2d 554. The racial composition of the Knoxville schools is not the result of present or past discriminatory action upon the part of the School Board. Knoxville is in compliance with *Swann*. Accordingly, Knoxville is operating a unitary school system consistent with constitutional requirements." 340 F.Supp. at 729.

We do not consider attorneys' fees since plaintiff did not prevail in the District Court or here. Moreover, there was no wilful refusal of the Board to comply with orders of the Court.

Affirmed.

LIVELY, Circuit Judge, concurring:

I would affirm the judgment of the District Court because it has complied with the directions of this Court as contained in the opinion of Judge O'Sullivan in 444 F.2d 632 (6th Cir. 1971). The situation before Judge Taylor upon remand from this Court was quite different from that faced by Judge McMillan in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). In this case the District Judge had two plans presented to him for further desegregation of the Knoxville School system. As his opinion demonstrates, there were a number of reasons for giving less weight to the plan offered by the plaintiffs than to the one offered by the Board of Education. As trier of the facts it was his responsibility to make judgments on the weight of evidence and credibility of the various witnesses.

While it is true that some schools in the Knoxville system will remain identifiably black or white on the basis of pupil enrollment, this is largely the result of several concentrations of blacks in the area of East Knoxville. In *Swann* the Supreme Court recognized that there are frequently concentrations of minority groups in one or more parts of a metropolitan area and the existence of a small number of racially identifiable schools in these areas is not, in and of itself, a sign that a dual system exists.

The school authorities have taken affirmative action to improve the racial mix of the schools, as required by our previous decision. Furthermore, the appellee presented evidence from which the Court was justified in finding that no plan involving the transportation of pupils between non-contiguous zones would be feasible at this time. However, I do not believe that the inconclusive evidence in this record concerning the financial condition of the City of Knoxville provides sufficient reason for failing to order the transportation of pupils if the Board of Education of Knoxville were found to be operating a dual public school system which required busing in order to become a unitary system.

Having found that a unitary school system exists, the District Court acted within its discretion in refusing to adopt a plan which would require busing of a large number of pupils in order to obtain a certain percentage of black students in each school in the system. As the Supreme Court said in *Swann* at page 24, "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

I concur in the result for the reasons set forth herein.

Josephine GOSS et al.
v.
BOARD OF EDUCATION, CITY OF KNOXVILLE.
Civ. A. No. 3984.

United States District Court
E. D. Tennessee, N. D.
June 7, 1967.

School desegregation case. The District Court, Robert L. Taylor, Chief Judge, held, inter alia, that rule authorizing superintendent of schools to continue enrollment of students in their present schools until completion of grade requirement for such schools, providing that such is consistent with sound administration, was valid where evidence showed that such rule was not used to promote racial segregation, and that school board policy permitting younger children to transfer to schools out of their zone of residence where an older brother or sister was attending was valid where proof showed that such rule was not operated to promote racial segregation but was for benefit of parents and students.

Order in accordance with opinion.

1. Schools and School Districts ⇐154
Rule authorizing superintendent of schools to continue enrollment of students in their present schools until completion of grade requirement for such schools, providing that such is consistent with sound administration, was valid where evidence showed that such rule was not used to promote racial segregation. U.S.C.A.Const. Amend. 14.

2. Schools and School Districts ⇐154
School board policy permitting younger children to transfer to schools out of their zone of residence where an older brother or sister was attending was valid where proof showed that such rule was not operated to promote racial segregation but was for benefit of parents and students. U.S.C.A.Const. Amend. 14.

3. Schools and School Districts ⇐155
A class action brought by students and parents precludes consideration of school personnel other than faculty.

4. Schools and School Districts ⇐13
Neighborhood school system is not objectionable on constitutional grounds in absence of a showing that such a system is being used to deprive a student of his constitutional rights.

5. Schools and School Districts ⇐154
No constitutional duty exists on part of school board to bus Negro or white children out of their neighborhoods or to transfer classes for sole purpose of alleviating racial inbalance which school board did not cause, nor is there any duty to select new school sites solely in furtherance of such purpose.

6. Schools and School Districts ⇐154
School district offends no constitutional requirements when it grants to all students uniformly an unrestricted freedom of choice, regardless of zoning, as to schools attended so that each pupil in effect assigns himself to school he wishes to attend.

7. Schools and School Districts ⇐13
Drawing of school lines is a discretionary function of school board, but when challenged the burden of proof is on school board to demonstrate that school lines of each school were not drawn with a view to preserve a maximum amount of segregation.

8. Schools and School Districts ⇐13
Evidence in school desegregation case required conclusion that there was no intentional gerrymandering of school lines by school board in order to promote racial segregation.

9. Courts ⇐262.4(9)
Court has no right to inject itself into supervision of state schools unless there is a clear disregard of a plaintiff's constitutional rights.

Carl A. Cowan, Knoxville, Tenn., Z. Alexander Looby, Avon N. Williams, Jr.,

Nashville, Tenn., Jack Greenberg, New York City, for plaintiff.

S. Frank Fowler, Knoxville, Tenn., for defendants.

MEMORANDUM

ROBERT L. TAYLOR, Chief Judge.

This case has had a long history. Seventeen students attending school in the Knoxville preparatory and school systems, joined by their parents or guardians, filed suit on December 11, 1959 against the Board of Education of the City of Knoxville, the Members of the School Board, Superintendent of Schools, and a number of principals of schools, seeking: an injunction against the defendant from refusing to admit or transfer them to the respective schools which they had sought to enter and which they were prevented from entering because they were members of the Negro race; an order declaring the policy and practices of defendants to be unconstitutional, in excluding plaintiffs and other persons similarly situated from the elementary or secondary schools of Knoxville because of their race pursuant to Article II, Section 12 of the Constitution of Tennessee, Section 49–3701, 49–3702 and 49–3703 of the Tennessee Code; an injunction prohibiting the defendants from engaging in any other actions that limit or affect admission to the Knoxville schools of the infant plaintiffs, or any Negro children similarly situated under defendants' jurisdiction; and, an order requiring the defendants to present to the Court a complete plan designed to bring about good faith compliance with the decision of the Supreme Court of the United States in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, at the earliest practicable date throughout the public school system of the City of Knoxville and of Knox County which shall provide for a prompt and reasonable start towards desegregation of the public schools of said City and a systematic and effective method for achieving such desegregation, with all deliberate speed.

Following the answer of the defendants to the complaint, a hearing was had on February 8, 1960. An order was entered on that date by the Court directing the School Board to submit on or before April 8, 1960 a plan to bring about a good faith compliance with the decision in Brown v. Board of Education, supra. On April 8, 1960, the Board of Education complied with that order, and submitted a plan of desegregation called Plan 9.[1]

1. "1. Effective with the beginning of the 1960–61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.

2. Effective for 1961–62 school year racial segregation shall be discontinued in Grade Two and thereafter in the next higher Grade at the beginning of each successive school year until the Desegregation Plan is effected in all twelve grades.

3. Each student entering a desegregated grade in the Knoxville Public Schools will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.

4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.

5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and then transfer is practicable, consistent with sound school administration.

6. The following will be regarded as some of the valid conditions to support requests for transfer:

a. When a white student would otherwise be required to attend a school previously serving colored students only;

b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

Plaintiffs objected to the plan upon a number of grounds, the main one being that it did not provide for elimination of racial segregation as required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

An extended evidentiary hearing was held on the objections to the plan on August 8, 9, 10, 11 and 12, 1960. On August 19, the Court filed a detailed memorandum approving the plan, with the single exception of the provision relating to technical and vocational courses offered in the Fulton High School to which Negro children would not have access, and directed the Board to submit a plan which would give the Negro students who desired technical and vocational courses an opportunity to take them. (186 F.Supp. 559).

On September 2, 1960, plaintiffs filed a motion for a new trial and for appropriate relief from the operation of the judgment entered on August 26, 1960 pursuant to the memorandum opinion. On September 6, 1960 the Court entered an order denying the motion. An appeal was taken by plaintiffs following the denial of a new trial.

While the appeal was pending, defendants filed a plan to provide vocational and technical training for Negro students similar to those provided for white students at Fulton High School.[2]

Defendants also filed a statement entitled "Transfer Policy—Vocational Division—Knoxville City Schools—'Procedures.'"[3]

2. "1. Continue present general policy of providing vocational facilities at Austin High School and at Fulton High School when it is shown that fifteen or more properly qualified students are interested in the training.

2. When a course cannot be established at either Austin High School or Fulton High School because of lack of a sufficient number of qualified students, and the course is already available at the other school, the student or students may request and obtain transfer upon the terms as set out in the transfer policy now in effect in the Knoxville City Schools for vocational students, same being a part of this plan.

3. When a vocational facility is not already available at either Austin High School or Fulton High School, but a sufficient number of qualified students are available through a combination of students from the two schools, the new facility may be established at either school.

4. Factors to be used in deciding whether or not a new course is established.

(a) Number of qualified students as determined by Bulletin No. 1—"Administration of Vocational Education," Federal Security Agency, Office of Education. These are:

1. The desire of the applicant for the vocational training offered;
2. His probable ability to benefit by the instruction given; and
3. His chances of securing employment in the occupation after he has secured the training, or his need for training in the occupation in which he is already employed.'

(Enrollment in vocational classes is limited to students who have reached their fourteenth birthday.)

(b) Availability of space to take care of the maximum as provided by the State Board of Vocational Education.

(c) Cost as determined by the Board of Education based upon availability of funds.

5. In the continued promotion of the vocational program in the Knoxville City Schools, the Board of Education will follow the rules and regulations as set forth from time to time by the State Board for Vocational Education.

6. The principals of the schools involved, the Director of Vocational Education, and the Superintendent acting on behalf of the Board of Education will be responsible for carrying out this plan consistent with sound school administration and without regard to race.

7. This plan is to become effective at the beginning of the school year, September, 1961."

3. "1. The student must indicate an interest in taking a vocational course.

2. The student fills out Form #235 in triplicate at least four weeks before the end of a school semester. (Copy of Form #235 is attached and made a part of this plan.)

3. The principal is responsible for seeing that at least one standardized voca-

The Sixth Circuit Court of Appeals in affirming this Court's judgment in some respects and in modifying it in others (301 F.2d 164), stated at page 168:

"In conclusion, we affirm the judgment of the District Court in the following respects: the approval of the plan insofar as it pertains to school grades already integrated; the approval of the plan as to items three and four thereof, providing for zoning or districting based upon location and capacity of school buildings and the permission of students to attend schools designated for their zones; the approval of the plan as to transfers subject to it being used for proper school administration purposes and not for perpetuation of segregation; the rejection of the plan so far as it pertains to Fulton High School and the order to the board to resubmit a plan in a reasonable time that will permit Negro students to have the advantage of the special courses of that high school and the denial of injunctive relief.

"We modify the judgment of the District Court insofar as it approved the board's plan for continued segregation of all grades not reached by its grade-a-year plan. It is not the function of this Court to formulate or dictate to the board a plan for the operation of the Knoxville schools. It is, likewise, not our intention to require immediate total desegregation. We do believe, however, that more grades than contemplated by the board's plan should now be desegregated. In the light of the board's experience with the present plan, it should be enabled to submit an amended plan that will accelerate desegregation and more nearly comply with the mandate of the Supreme Court for 'good faith compliance at the earliest practicable date.'

"The case is remanded to the District Court with instructions to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation, in accordance with the views herein expressed."

tional aptitude test is given the student and that the results are recorded on Form #235.

4. Parents will be furnished a description of the vocational courses. A copy of Form #235 (the transferring document) must be approved by the parents. A statement that the student transferring intends to remain in the new school for a period of at least one school semester, contingent upon the student being able to profit by the course offered, must also be approved by the parents.

5. If the parent signs Form #235 approving the transfer, the principal will review the application, confer with the attendance worker and either approve or disapprove the transfer, writing into the record his reason, or reasons, for disapproval.

6. The student is required to fill out Form #206 (the official Enrollment Card), omitting only the schedule section of said card. (Copy of Form #206 is attached and made a part of this plan.)

7. Forms #206 and #235, along with the students cumulative card shall be sent to the Attendance Department for endorsement.

8. Forms #206 and #235, along with the student's cumulative card, will then be forwarded to the receiving principal.

9. The principal of the receiving school, after reviewing the student's record, either accepts or rejects the transfer, setting out in writing the reason or reasons, for rejection.

10. An appeal from the decision of the sending principal or of the receiving principal may be made to the Superintendent by the student requesting the transfer. An appeal from the decision of the Superintendent may be made to the Board of Education. Said appeal to the Superintendent shall be filed in writing with the Superintendent within four weeks after the student has received notice of the decision of the principal from which the appeal is taken. The appeal from the Superintendent's decision must be filed in writing with the secretary of the Board of Education within two weeks after the student receives notice of the Superintendent's decision.

11. No student will be accepted at either Austin High School or Fulton High School without following the above transfer procedure. (The requirement in Item #2 above shall not apply to a new student who becomes a legal resident of the City of Knoxville after deadline referred to in said item.)"

Plaintiffs' petition for certiorari was granted and this case was heard by the Supreme Court on March 20, 21, 1963 along with a case from Davidson County involving a similar question, and was decided by it on June 3, 1963. (373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632). In the *Goss* case, the Supreme Court considered only Section 6 of the plan, which was the transfer section (supra, Footnote 1). This Section the Supreme Court held invalid because it promoted racial discrimination. It observed that transfers are available to those who choose to attend school where their race is in the majority, but that there was no provision whereby a student might transfer upon request to a school in which his race was in the minority, unless he qualified for a good cause transfer. The Court further observed:

> "This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fail. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. But no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." pp. 688, 689, 83 S.Ct. p. 1409.

The Board submitted a plan for Fulton Vocational High School on March 31, 1961 and an evidentiary hearing was held by this Court thereon. The Court in a memorandum opinion rendered on June 19, 1961 approved the plan with the single reservation that: "A student who lives near Fulton and who possesses the necessary vocational qualifications to enter Fulton should not be required to travel across town to attend Austin when Fulton is much nearer."

Plaintiffs' second appeal involving the Fulton School was decided by the Court of Appeals on July 6, 1962 (305 F.2d 523), in which this Court was affirmed in approving the plan except insofar as it pertained to the transfer procedures. The case was remanded by the appellate court with instructions to require an amendment that would permit all students to transfer as a matter of right when they qualified for the courses which they desired to take in one of the two high schools involved (Fulton and Austin), and such course was not available to them in the school they were attending.

On June 18, 1962 plaintiffs filed a motion to require defendants to file immediately a supplemental plan for accelerating desegregation of the City Schools of Knoxville as of the beginning of the 1962–63 academic school year, in accordance with the mandate of the Court of Appeals for the Sixth Circuit filed in this Court on June 8, 1962.

On June 25, 1962 the Board stepped up the integration schedule so as to include the fourth grade, as well as the third, effective September 1, 1962.

Plaintiffs filed objections to the amended plan and urged in support a number of grounds and requested that the case be advanced on the docket for an immediate hearing on the objections.

On March 14, 1963 the plan was further amended so as to desegregate the fifth and sixth grades, effective with the school year 1963–64. Objections were filed to this plan. The Board desegregated the summer junior and senior daytime high schools to be held at Tyson Junior High School and West High School beginning June, 1963 so that anyone could attend these schools on the basis of his or her record and qualifications, without regard to ra[illegible].

The hearing was held on the amendments to the plan on April 1, 1963 and this Court held that desegregation of the fifth and sixth grades complied with the mandate of the Court of Appeals. The Board was ordered to file an amended plan with respect to the Fulton High School showing that it had complied with the mandate. The Board was directed to make schools available to all retarded children.

The Board submitted a plan on May 15, 1963 regarding Austin and Fulton High Schools, and regarding schools for retarded children.

On February 28, 1964, the Sixth Circuit Court of Appeals entered the following order on what appears to have been plaintiffs' third appeal:

"Upon the statement of the attorney for the defendants-appellees to the effect that the Board of Education of the City of Knoxville, Tennessee has decided to file by June 5, 1964 a plan to eliminate all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System not later than the time that regular school sessions begin in September, 1964, the appeal is dismissed and the case remanded for further proceedings in the District Court effectuating said decision."

Following this order, this Court directed the Board to file by June 5, 1964 a plan as proposed by it in the hearing before the Court of Appeals, which plan would be effective by the time the regular school sessions began in September, 1964.

On May 11, the Board filed a plan adopted on May 11, 1964 providing for complete desegregation of the public schools of Knoxville. Plaintiffs objected to this plan on June 11, 1964 upon the ground that it did not meet the requirements of the Fourteenth Amendment to the Federal Constitution and urged in support of its objections six separate grounds.

The Court advised counsel on more than one occasion that it desired a hearing on these objections. Counsel advised the Court that they felt all matters would be settled between the plaintiffs and the School Board except the provision of the plan relating to transfers, and that there was a possibility of agreement on this provision.

But on January 21, defendants moved for a pre-trial conference. Such conference was held on February 5, 1965 and an order entered pursuant thereto on February 12, 1965, approved by the attorneys for the respective parties. Paragraphs 1 and 5 of the plan were amended and Paragraph 6 was added. The amended plan for complete desegregation was filed on February 16, 1965, as follows:

"1. Effective with the beginning of the school year in September, 1964, all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System shall be eliminated and abolished. Without limiting the generality and effectiveness of the foregoing, all teachers, principals and other school personnel shall be employed by defendants and assigned or re-assigned to schools on the basis of educational need and other academic considerations, and without regard to race or color of the persons to be assigned, and without regard to the race or color of the children attending the particular school or class within a school to which the person is to be assigned. No transfer or re-transfer of a teacher, principal or other school personnel may be granted or required for considerations based upon race and color and no assignment or re-assignment of such teacher, principal or other school personnel may be made for considerations based upon race or color.

"All tenure and seniority rights are to be observed and the defendants will not utilize or attempt to utilize the provisions of the State Teacher Tenure Law or any other law, custom or regulation conferring discretion upon them in the employment and discharge of teachers or the abolition of teaching positions in such manner as to discriminate either directly or indirectly on account of race or color in the employment, discharge, re-employment, assignment, or re-assignment of teachers, principals or other school personnel in the Knoxville City School System.

"2. Each student will be assigned to the school designated for the district in which he or she legally resides,

subject to variations due to overcrowding and other transfers for cause.

"3. A plan of school districting based upon the location and capacity (size) of school buildings and the latest enrollment studies will be followed subject to modifications from time to time as required.

"4. Requests for transfer of students from the school of their district to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

"5. Students may request transfer to or enrollment in any vocational or technical facility sponsored by the Knoxville City Board of Education and will be accepted subject to requirements respecting aptitude, ability, pretraining, physical condition, age, and other considerations including adequacy of facilities.

"6. The Board of Education recognizes the continuation of jurisdiction of the United States District Court for the Eastern District of Tennessee, Northern Division, at Knoxville of this Board and the matters involved in this plan, until termination of said jurisdiction by express direction of said court."

Plaintiffs filed objections to Paragraphs 2, 3 and 4 of this plan on February 23, 1965.

On July 28, 1965 a pre-trial conference was held on the plan and an order entered pursuant thereto on July 30, 1965. Paragraph 3 of the February 16, 1965 plan, as amended by statement of the Board on April 19, 1965, was stricken and the following transfer plan substituted:

"Upon written application, students may be permitted to transfer to schools outside their assigned attendance zones only in exceptional cases for objective administrative reasons and no transfer shall be granted, denied or required because of race or color."

The plan was further amended by striking Paragraph 4 and substituting the following provision relating to transfers:

"All applications of students for transfers to schools outside their assigned attendance zones shall be considered, and approved by the Superintendent of Schools at his discretion, pursuant to recommendation of the Director of the Department of Child Personnel after due investigation and consideration of the Department of Child Personnel."

The Board was ordered to file the plan in a single document and to publicize the provisions of the plan of desegregation as modified so that pupils and parents would be more fully informed. The order further recited that:

"The Plaintiffs' last Specifications of Objections to said Plan of Desegregation, in Paragraph 1 thereof, attacked upon constitutional grounds paragraph 1 of the statement of the Board of Education of April 19, 1965, in which the Board of Education set out a Plan for permissive continued enrollment of pupils in the year 1965–66 and thereafter in the schools attended in the previous year. This remains as an unresolved issue in this case. The Court informed Counsel that a trial on that issue may be had on August 3, 1965, but Counsel for the Plaintiffs stated that it would be impossible for Plaintiffs to prepare for trial upon such short notice, and that Plaintiffs wish to preserve their right of attack upon said provision of the Plan. The trial of this issue is deferred to such time as the Court can find an open date; and in the meantime the defendants are fully authorized to follow the Plan of Desegregation as presented relative to the school year 1965–66, but giving effect to the modifications ordered above."

Thus, as shown by the foregoing order which was approved by the attorneys for the respective parties, the unresolved is-

sue in the case was the validity of the Board's action, as set out in the plan, "for permissive continued enrollment of pupils in the year 1965–66 and thereafter in the schools attended in the previous year."

A detailed statement of the plan was filed in conformity with the order of July 30, 1965 on August 6, 1965.[4]

The Court called the case for hearing at its regular December, 1965 term of court and at its regular May, 1966 term, but was advised that there was only one issue to be resolved and that the parties felt there was a possibility of resolving this issue and that they desired more time. At the joint suggestion of the parties, the case was not set for trial on the merits at either of these terms of court.

Plaintiffs filed an amendment to their objections to the amended plan for complete segregation on January 19, 1966, in which they objected to the brother-sister transfer provision.

During the sounding of the December, 1966 docket, the one issue, that involving the brother-sister transfer provision, not having been resolved, the Court set the case for trial on the merits for March

4. "1. Effective with the beginning of the school year in September, 1964, all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System shall be eliminated and abolished. Without limiting the generality and effectiveness of the foregoing, all teachers, principals and other school personnel shall be employed by defendants and assigned or re-assigned to schools on the basis of educational need and other academic considerations, and without regard to race or color of the persons to be assigned, and without regard to the race or color of the children attending the particular school or class within a school to which the person is to be assigned. No transfer or re-transfer of a teacher, principal or other school personnel may be granted or required for considerations based upon race and color and no assignment or re-assignment of such teacher, principal or other school personnel may be made for considerations based upon race or color.

"All tenure and seniority rights are to be observed and the defendants will not utilize or attempt to utilize the provisions of the State Teacher Tenure Law or any other law, custom or regulation conferring discretion upon them in the employment and discharge of teachers or the abolition of teaching positions in such manner as to discriminate either directly or indirectly on account of race or color in the employment, discharge, re-employment, assignment, or re-assignment of teachers, principals or other school personnel in the Knoxville City School System.

"2. Each student will be assigned to the school designated for the district in which he or she legally resides, subject to variations due to overcrowding and other transfers for cause, and the Superintendent may permit continued enrollment of students in their present schools until completion of the grade requirements for said school, provided this is consistent with sound school administrative policy.

"3. A plan of school districting based upon the location and capacity (size) of school buildings and the latest enrollment studies will be followed subject to modifications from time to time as required. (Zone maps and typed statements of Zone boundaries were filed in this case April 27, 1965.)

"4. Upon written application, students may be permitted to transfer to schools outside their assigned attendance zones only in exceptional cases for objective administrative reasons and no transfers shall be granted, denied or required because of race or color. All applications of students for transfers to schools outside their assigned attendance zones shall be considered and approved by the Superintendent of Schools pursuant to recommendation of the Director of the Department of Child Personnel after due investigation and consideration of the Department of Child Personnel.

"5. Students may request transfer to or enrollment in any vocational or technical facility sponsored by the Knoxville City Board of Education and will be accepted subject to requirements respecting aptitude, ability, pre-training, physical condition, age, and other considerations including adequacy of facilities.

"6. The Board of Education recognizes the continuation of jurisdiction of the United States District Court for the Eastern District of Tennessee, Northern Division, at Knoxville of this Board and the matters involved in this plan, until termination of said jurisdiction by express direction of said court."

31, 1967. At the instance of counsel, the case was continued until May 11, 1967. In the meantime, another pre-trial was held on March 10, 1967 and an order entered pursuant thereto.

Plaintiffs contend in their theories as set forth in the pre-trial order that the provision giving the children who were presently enrolled in schools an option to remain in those schools until they completed their grade requirements promoted segregation.

The rule that permitted the younger brother or sister of a child to enroll in the school where the older member attended was objected to for the same reason. Plaintiffs stated that a hearing should be held on the question whether the plan had in its operation been effective in eliminating discrimination in the school system in compliance with the constitutional requirement.

It is the theory of the defendants, as set forth in the pretrial order, that where a pupil becomes a student in a particular school, as for instance a junior high school, the interests of his education are promoted by permitting him to retain whatever outside activity places he has obtained, by remaining in that school even though he resides in a different zone from that of the school he attends.

Defendants further contended that the brother-sister provision should be retained because of transportation problems involved with families having children attending different schools and other conveniences to the families and students. Defendants contended that the plan as a whole has been effective in its operation in the elimination of discrimination in the school system and that it complies with constitutional requirements.

The three issues set forth in the pretrial order were:

(1) Whether the grade requirement provision, enabling students to continue in their present school until graduation, complied with the Fourteenth Amendment.

(2) Whether the rule permitting children of the same family to transfer to and attend schools out of their zones of residence where a brother or sister might be otherwise required to attend different schools, violates the Fourteenth Amendment.

(3) Whether the operation of the plan complied with the Fourteenth Amendment in relation to Issues 1 and 2.

Plaintiffs submitted a modification to the pre-trial order on March 10, in which they requested that Issue No. 3 be deleted and the following inserted:

"(3) Whether or not the Knoxville Public School System is effectively desegregated in compliance with the Fourteenth Amendment to the Constitution of the United States in relation to 1) Pupil Assignment, 2) Faculty, 3) Administrative Staff and Clerks, 4) Principal Clerks, 5) Maintenance and Operation Personnel, 6) School Programming, 7) Organization and Curriculum, 8) Extra-Curricula Activities, 9) Facilities and New Construction and 10) School Boundaries or Zone Lines."

The Court denied the request as it related to the matters numbered 3 to 10 unless plaintiffs furnished citations of authority pointing out cases in which the courts had dealt with such matters.

Plaintiffs excepted to the pre-trial order as modified on March 27, 1967 and on May 1, 1967 submitted a statement of the cases relied upon in conformity with the modified pre-trial order.

Plaintiffs' motion to further modify the amended pre-trial of March 10, as modified on March 15, was denied.

On May 8, plaintiffs filed a 7½ page motion entitled "Motion for Further Relief." It is largely a repetition of the motion and objections and exceptions previously filed, except that it stated the defendants had planned and were planning the construction of new schools and school facilities in such manner and locations that would adhere to and increase segregated racial residential patterns and would maintain and perpetuate racial segregation and that defendants had drawn and continued to maintain and

enforce school boundaries or zone lines which are gerrymandered according to race and which disregarded sound principles of school administration relating to school capacity.

Plaintiffs asked that the Board: provide a system that would effect an equitable distribution of Negro and white faculty and staff members in each school and provide a plan of employment of supervisory and professional staff, administrative staff, clerks, maintenance and operation personnel, in such a manner that the racial segregation, exclusion and discrimination, which plaintiffs claim now exists, be disestablished and that there be equitable distribution of Negro employees; provide a plan of programming, organization and extra-curricular activities designed to disestablish all existing racial and socio-economic segregation and discrimination in the system; and establish a plan of new school construction which shall be based not upon racial or socio-economic residential patterns, but which shall be based upon, and provide for both the present and future, an equitable distribution of racial and socio-economic elements in the population of each school in the school system.

A full evidentiary hearing was held in which the parties were permitted to introduce proof relating to all the issues set forth in the pre-trial order of March 10, as modified by order of March 15. A comparatively large record was made consisting of hundreds of pages of exhibits, including maps, charts, documents pertaining to transfers, school building surveys, annual statistical reports of the Superintendent, insurance reports, desegregation of teaching personnel, classification of students, school expansion programs, etc.

One of the attorneys for the plaintiffs, in his argument, stated that there were two questions for the determination of the Court, namely, whether the grade requirement rule and the brother-sister rule that permitted some students to attend school out of the zone in which they lived, met constitutional requirements and whether the plan which has been in effect with some modifications since the 1960–61 school year, which started out with what is known as the stair-step desegregation, namely, a grade-a-year plan, and ripened into a plan of full desegregation beginning in the school year 1964–65, is operated so as to perpetuate segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Completion of Grade Requirement

This rule became effective for the school year 1965–66 and will expire by its own terms within three years from that date. Transfers under this plan amount to around six per cent of the entire student body of 37,220 students. The rule authorizes the Superintendent of Schools to continue enrollment of students in their present schools until completion of the grade requirement for said schools, providing this is consistent with sound administration. Those who testified on the subject stated that this was a rule that was very important in the administration of the schools. If the rule were changed, it would reduce the number of Negroes attending white schools according to Dr. Bedell. The Negroes have been permitted to go to the school of their choice. The rule has not been used to promote segregation. It is not mandatory, but operates only upon the student's application. A student who is forced to leave the school he first chooses would sacrifice the beneficial association that he has made with his classmates, and would sever his connection with extra-curricular activities in which he has participated in that school such as football, basketball or baseball, Glee Club, dramatic club or band activity, or other valuable relationships which he has made.

A like provision was approved by the Court in the case of Monroe v. Board of Commissioners of City of Jackson, Miss., 221 F.Supp. 968 (1963), and approved again in the same case at 244 F.Supp. 353 (July 30, 1965).

[1] The preponderance of the evidence shows, and the Court finds, that

this provision of the plan is not used to promote segregation and is, therefore, valid.

* School Board Policy Adopted August 23, 1965, Permitting Younger Children to Transfer to Schools Out of Their Zone of Residence Where an Older Brother or Sister is Attending

The School Board adopted a resolution on August 23, 1965 which permitted a younger child to go out of his zone of residence to attend his older brother or sister's school.

This rule was made at the time of the City's annexation which brought into the City Limits the Rocky Hill School. At that time, older members of the family who lived in the Rocky Hill zone were attending school in Bearden. Under the zone requirement, the younger members would have been required to go to Rocky Hill. This would have presented a transportation inconvenience and expense for the parents in forcing them to take their children to two different schools. The Board was advised by counsel that there was no racial implication in allowing all members of the family to attend the same school. This prompted the Board to pass a resolution reciting that it was the policy of the Board that the younger child be placed in the same school where an older one was. Defendants conceded that if this rule were carried out to promote segregation it would be invalid.

A similar mandatory rule was condemned in Ross v. Dyer, 312 F.2d 191 (C.A.5). In that case it was used to perpetuate segregation and was rightfully condemned.

[2] This Court can visualize instances in which both economic hardship and serious inconvenience would result if the younger child were not permitted to attend the same school which their older brothers and sisters attend. The proof shows that if this provision is eliminated, it will promote desegregation in some instances and in some instances it will not. The proof further shows that it is not operated to promote segregation but is operated for the benefit of the parents and students. The transfers under this provision involved around one percent of the students only.

This brings us to a third issue, namely, whether the Board has operated the plan as modified to promote segregation in violation of the Fourteenth Amendment.

The items which plaintiffs raised under this issue were many. They contended that the zone lines were made to promote segregation. These lines were in the plans that were approved by this Court and were reviewed by the Sixth Circuit on at least two appeals and presumably were either not attacked or were impliedly approved by the Supreme Court of the United States when it considered and remanded the case to the Court of Appeals by holding that the transfer plan involving the minority-majority rule was unconstitutional. This day is late for making a claim that the zones are unconstitutional because they promote segregation.

The Knoxville School System is known as the neighborhood system. The neighborhood school has been approved by various courts, including our own Circuit.

The great and convincing preponderance of the proof shows that the zones were not made to promote segregation. The effect of the testimony of Dr. Osborne was that the zones were not intentionally gerrymandered, but that in many instances they promoted segregation.

Doctor Adams stated that the zone lines were designed to fill school buildings. The population is moving from the interior of the town and towards the suburbs. This factor was taken into consideration in planning the new school buildings at Bearden and Fountain City. The University of Tennessee is now making a study of the Knoxville School program and school plans. Dr. Adams stated: that the school structure in Knoxville was more complicated than in many other places; that one of its purposes was to desegregate teachers and that they were desegregating teachers; that they were also pushing desegrega-

tion of staff as fast as possible within reason; that it was the Board's policy to hire people on account of ability and competency; that equal opportunity for occupational jobs is given proper consideration although he has not had an opportunity to do much about it in the past two years because of dollar restrictions; and that the intra school activities are desegregated.

[3] It was held in the case of Mapp v. Board of Education of City of Chattanooga, Tennessee, 319 F.2d 571 at 576 (C.A. 6), that school personnel other than teachers and principals cannot be considered in a class action brought by students. The Court referred the case back to the District Court to consider faculty desegregation only. See Bradley v. School Board of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187. The present suit is a class action brought by students and parents and precludes consideration of school personnel other than faculty.

[4] The neighborhood school system, if used to discriminate against Negroes, has been held to be unconstitutional. E. G., Norwood v. Tucker, 287 F.2d 798 (C.A. 8); Northcross v. Board of Education of City of Memphis, Tenn., 302 F.2d 818 (C.A. 6); Green v. School Board of City of Roanoke, Virginia, 304 F.2d 118 (C.A. 4); Dodson v. School Board of City of Charlottesville, 289 F.2d 439 (C.A. 4). On the other hand, these same cases recognize the principle that in the absence of a showing that such school systems are being used to deprive a student of his constitutional rights, they are not objectionable on constitutional grounds. Downs v. Board of Education of Kansas City, 336 F.2d 988, 995 (C.A. 10).

Some of the facts in *Downs* are similar to those found here. In that case, there was a racial imbalance in the public schools of Kansas City, where there was a total of 7,467 Negro children in the elementary, junior high and senior high schools. Almost 73 per cent of these children, or 5,405, attended the nine schools which were predominantly Negro. The remaining 27 per cent, or 2,062, attended 26 integrated schools. The schools located nearest to the concentration of Negro population had the highest percentage of Negro pupils and the schools the farthest away from that concentration were composed entirely of white students. Thus, while there were some schools having an all Negro student body and some having an all white student body, there were also 26 of the Kansas City schools which had both Negro and white students. The superintendent of schools testified that the school attendance districts were laid out without regard to race and upon the basis of geography, school capacity and number of children residing in the district.

The Court held that there was no basis in fact for the appellants' contention that the evidence established "a clear pattern of deliberate use of zone lines and assignment regulations to insure the continued operation of a dual school system." All of the evidence was to the contrary and the trial court so found, saying that the boundary lines after 1954 were set on the basis of building location and after population studies indicated the predictable pupil loads which the various buildings could accommodate. The Court further held that the drawing of school zone lines was a discretionary function of a school board and would be reviewed only to determine whether the school board acted arbitrarily.

The Court observed that it was true that the staffs of the various schools were either all white, as is the case in white and integrated schools, or all Negro. But, the appellants did not, by their complaint or evidence, seek to have the staffs desegregated. Furthermore, they did not cite and the Court did not find any case holding that such a policy, in and of itself, was sufficient to establish a discriminatory intent on the part of the Board.

The Court further observed that none of the factors relied upon by appellants, when considered alone, was sufficient to establish a denial of their constitutional

right not to be discriminated against because of race or color; that the crucial question was whether all of those factors considered together were sufficient to establish such a denial.

The Court held that there was no evidence of intentional gerrymandering of the school attendance districts, no intentional use of a dual school system, no assignment of pupils according to racial factors nor any other schemes or devices condemned in the cases. It was concluded that the Kansas City school system met the "minimal requirements for nonracial schools" or "geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right."

Appellants also contended in the *Downs* case that even though the Board may not have been pursuing a policy of intentional segregation, there was still segregation in fact in the school system and under the principles of Brown v. Board of Education, the Board had the positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. The Court observed that while there seemed to be some authority to support that contention, the better rule was that although the Fourteenth Amendmen prohibits segregation, it does not command integration of the races in the public schools, and that Negro children had no constitutional right to have white children attend school with them. The Court concluded by saying that the question was conclusively answered in Bell v. School City of Gary, Indiana, 324 F.2d 209, 218 (C.A. 7) where the court held that "there is no affirmative U.S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils." It concluded that the decision in *Brown* and the many cases following it, would not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it resulted in a racial imbalance of the students within the schools, where the districts in the school system had been honestly and conscientiously arrived at with no intention or purpose of maintaining or perpetuating segregation. Downs v. Board of Education of Kansas City, supra, 336 F.2d 994–998.

Returning again to our case, Doctor Osborne testified for plaintiffs that some of the zone lines perpetuated segregation because housing projects, economic status and possibly other factors caused Negroes to locate in neighborhoods confined to their own race. He put much stress on the Coleman report in his testimony. He made it clear that he did not intend to convey the idea that the School Board and school officials had prepared the zone lines for the purpose, and with the intent, of promoting segregation.

Doctor Bedell testified for defendants that the zone lines were inaugurated in 1963 and that the schools were located as near to children as possible to avoid the hazards of transportation. He further stated that Negroes had been permitted to attend the schools of their choice.

The Court finds that in 1965, three small Negro schools were closed; that in 1961, eight schools were desegregated with 30 Negro students attending eight formerly white schools; that in 1962, 21 Negroes were attending desegregated schools; in 1962–63, 84; in 1964, 13 formerly white schools were attended by 253 Negro children; in 1964–65, 29 formerly white schools were attended by 717 Negro children; in 1965–66, 1195 and that in the seventh month of the school year 1967, 31 formerly white schools were attended by 1783 Negroes.

It finds that in the school year 1960–61, the Knoxville School System had 41 schools—23 were all Caucasian, 10 all Negro and 8 integrated. In the first school year after annexation, 1963–64, the system had a total of 68 schools—43 all Caucasian, 12 all Negro, and 13 integrated. In the school year 1964–65, the number of integrated schools increased to 29, in the next school year of 1965–66 it increased to 33, and the num-

ber increased to 38 in the school year 1966–67. The number of all Caucasian schools dropped from 43 in 1963–64 to 21 in the current school year. The number of all-Negro schools dropped from 12 in 1963–64 to 5 in 1966–67.

It further finds that the total student enrollment in 1966–67 is 37,220 students, of which 5,615 are Negroes, or about 15 per cent of the total enrollment. Of these 5,615 Negroes, there are 4,641 or 82.6 per cent, of the Negro children in attendance at a school in which there is at least one Caucasian child.

It finds that in the school year 1963–64, all of the twelve grades were desegregated. All schools above the seventh grade have Negroes; that despite concentration of Negro residences, including large Federal housing centers, in the school year 1966–67 32 per cent of the Negro students in the Knoxville Public School System, amounting to 1,743 in number, attended schools in which white students either predominated or were in equal balance with Negro students, and in each such instance there was a substantial number of Negroes so that the benefits of educational integration were favorably presented for the students of both races. These schools and the number of Negroes in attendance were Bearden—63, Beaumont—35, Belle Morris—50, Brownlow—24, Cedar Grove—30, Fair Garden—291, Lincoln Park—21, Lonsdale—13, Moses—31, Park Lowry—338, Pond Gap—13, Ridgedale—31, Smithwood—37, Bearden High—32, Christenberry Junior High School—20, East High School—350, Fulton High School—62, Park Junior High School—104, Rule Junior High School—157, West High School—41.

It finds that staff integration began in 1965–66 with 11 schools having integrated staffs. In 1966–67, 35 of 64 schools, or 54.6 per cent of the schools, had integrated staffs. There is no Negro principal in a white school and no white principal in a Negro school. The schools were developed under the community concept and the zone lines followed community patterns. There are 29 Negro teachers assigned to white schools and 10 white teachers assigned to Negro schools.

The Court finds that after a slow start, the Board of Education and School Administration have moved with commendable zeal, conscientiousness and results toward the integration of the schools and faculties in an enormously complex situation. Knoxville is a town divided geographically on the south by a river with only three bridges across it, by a system of ridges on the north with a limited number of transportation routes therethrough, and by railroad systems quartering the town north and south, east and west, with multiple, hazardous grade crossings. The complexity has been heightened by the tendency of Negroes to live in two large, well-defined areas in the town rather than dispersed over it, by large urban renewal programs which displace portions of the population resulting in wholesale and unpredictable removals to other areas of the town, by the annexation of a large area of the County, since the beginning of this suit, whose students and schools have had to be absorbed into the City School System, by heavy increases in population necessitating a building program with crucial decisions as to building sites in the light of the geographical barriers and other factors involving population concentration and movements.

The Court finds that the above considerations are further complicated by serious budgetary limitations and fiscal complications, and by the fact that the Negro population itself constitutes but 15% of the whole, a fact, when figures alone are used, which tends to obscure what is actually a vigorous, straight-forward and expertly managed program of integration.

[5] The Court is of the opinion that there is no constitutional duty on the part of the school board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance which it did not cause, nor is there a duty to select new school sites solely in

furtherance of such purpose. Deal v. Cincinnati Board of Education, 369 F.2d 55, 61 (C.A. 6); Gilliam v. School Board of City of Hopewell, 345 F.2d 325 (C.A. 4).

"In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read Brown in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved * * *"

* * * * * *

"Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. * * *"

* * * * * *

"Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools. They must also expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice. If the school officials, through overt practice or by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must take affirmative action to remedy the condition which they have caused. Thus, even if the Negro students were distributed uniformly in the schools, if other forms of discrimination were used against them they would still be entitled to the aid of the law. When no discrimination is shown, racial imbalance alone is no warrant for relief." Deal v. Cincinnati Board of Education, supra, 369 F.2d pp. 61, 62, 63.

See Downs v. Board of Education, supra; Bell v. School City of Gary, Indiana, supra, and Springfield School Committee v. Barksdale, 348 F.2d 261, 264 (C.A. 1).

The district judge's denial of a preliminary injunction enjoining further construction of new elementary schools in the Cleveland school system was affirmed. Craggett v. Board of Education of Cleveland, 338 F.2d 941 (C.A. 6).

[6] The Court is of the opinion that a school district offends no constitutional requirements when it grants to all students uniformly an unrestricted freedom of choice (regardless of zoning) as to schools attended so that each pupil in effect assigns himself to the school he wishes to attend. Bradley v. School Board of City of Richmond, Va., 345 F.2d 310 (C.A. 4); Wheeler v. Durham City Board of Education, 346 F.2d 768 (C.A. 4); Goss v. Board of Education, 373 U.S. 683, 688–689, 83 S.Ct. 1405, 10 L.Ed.2d 632; Northcross v. Board of Education of City of Memphis, 333 F.2d 661, 665 (C.A. 6).

[7, 8] The drawing of zone lines is a discretionary function of the school board. Where challenged, the burden of proof is on the school board to demonstrate that zone lines of each school were not drawn with a view to preserve a maximum amount of segregation. Northcross v. Board of Education of City of Memphis, supra, 665. The Board has met the burden and one of plaintiffs' witnesses conceded there was no intentional gerrymandering.

[9] The Court stated infra in Olson v. Board of Education that the point to be recognized in a case where all other educational factors are equal, is that the Board's action is based upon expert opin-

ion. The test for arbitrariness in relation to additional policies of New York is not necessarily the same as the test for arbitrariness in determining whether there has been a violation of the Fourteenth Amendment. The Court has no right to inject itself into the supervision of state schools unless there is a clear disregard of plaintiff's constitutional rights. Olson v. Board of Education of Union Free School District No. 12, Malverne, N.Y., 250 F.Supp. 1000, 1009–1010 (D.C.).

A definition of "desegregation" is contained in the Civil Rights Act of 1964, and is as follows:

"§ 2000c. *Definitions*

"As used in this subchapter—

* * * * * *

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c.

Plaintiffs rely upon the recent cases of Kelley v. Altheimer, Arkansas Public School District No. 22, 378 F.2d 483 (C.A. 8); United States v. Jefferson County Board of Education, 372 F.2d 836 (C.A. 5). These cases may be differentiated on the facts from the case under consideration here. Moreover, we are bound by the holdings in our own Circuit.

The principles laid down in the case of Deal v. Cincinnati Board of Education, supra, are applicable to our case.

Since the Knoxville School System is desegregated under the plan which has been in operation since the school year 1963–64 and since the preponderance of the evidence shows that the plan is not being operated to deprive Negro students of their constitutional rights and that Negro school teachers are not being discriminated against because of their race, it is, therefore, ORDERED that the various objections to the plan be, and same hereby are, denied and the motion for an injunction enjoining proposed school buildings in the Bearden and Fountain City area be, and same hereby is, denied.

This is not a case in which attorneys' fees are permissible. Fleischmann Distilling Corporation v. Maier Brewing Co. et al., opinion by Chief Justice Warren, decided May 8, 1967, and found in 87 S.Ct. 1404.

This case having been in this Court since 1959 and the Court being of the opinion as outlined above that the Board and school authorities are moving skilfully and with expedition toward the full integration of the Knoxville School System, that there is no further need for the schools to operate under Court supervision, it is further ordered that the case be stricken from the docket.

TURNER CONSTRUCTION COMPANY, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 135-257.

United States District Court S. D. New York.

April 16, 1964.

Action by plaintiff taxpayer to recover paid income tax deficiencies on three separate and distinct claims for refund. The District Court, Levet, J., held, inter alia, that taxpayer's exchange of its stock in corporation, formed to complete construction project, for a non-negotiable contingent note of corporation, amounting to a fictitious sale, was not a "closed transaction" for income tax purposes, where at time of receipt of note job was not completed, claims were undetermined and taxpayers could pos-

Josephine GOSS et al.
v.
BOARD OF EDUCATION, CITY OF KNOXVILLE, TENNESSEE, et al.
Civ. A. No. 3984.

United States District Court,
E. D. Tennessee, N. D.
July 1, 1970.

School desegregation case. The District Court, Robert L. Taylor, J., held that neighborhood schools do not violate Fourteenth Amendment. The Court also held that evidence established that the defendant school board was operating a unitary school system.

Motion for injunction denied.

1. Schools and School Districts ⇐13
"Unitary school system" is one within which no person is to be effectively excluded from any school because of race or color.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐220
Neighborhood schools do not violate Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

3. Schools and School Districts ⇐154
Board of education did not have affirmative duty to change school zones to increase racial mixing of students.

4. Schools and School Districts ⇐154
Fact that one school had capacity of 1,200 students but was attended by 1,364 students and another school with capacity of 750 was attended by 361 students indicated violation by board of education of its stated policy of drawing school zone lines to conform to capacity of existing school structures and board must revise zones in area for succeeding school term to eliminate overcrowding at the first school and to utilize existing capacity at the second.

5. Schools and School Districts ⇐71
Use of portable classrooms as temporary expedient in neighborhoods which were so overcrowded that construction of additional school facilities was projected by board of education was decision within board's administrative expertise.

6. Constitutional Law ⇐220
Evidence did not establish that portable classrooms, which were used as temporary expedient in neighborhoods which were so overcrowded that construction of additional school facilities was projected by board of education, had been used in violation of rights of Negro pupils under the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

7. Schools and School Districts ⇐13
Evidence did not establish that feeder system on which junior and senior high schools depended for enrollment did not promote desegregation.

8. Schools and School Districts ⇐13
Evidence established that board of education was fulfilling its duty in integration of teachers in school system, in school desegregation case.

9. Schools and School Districts ⇐141(1)
Choice of teacher does not have much weight in area of assignment of teachers to achieve integration of faculties.

10. Schools and School Districts ⇐133, 141(1)
Evidence in desegregation case was insufficient to support charges of discrimination in hiring and discharge of teachers or principals or assignment of principals.

11. Schools and School Districts ⇐141(1)
In consideration of magnitude of duties of principals of public schools, board of education should have considerable latitude in assigning them.

12. Schools and School Districts ⇐13
Evidence in desegregation case established that schools had not been built to perpetuate a dual system and that

board of education had established and followed building principles consistent with neighborhood school system which had previously been approved by court.

13. Schools and School Districts ⇐13

Evidence established that defendant school board was operating a unitary school system in desegregation case.

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S. Frank Fowler, Knoxville, Tenn., for defendants.

MEMORANDUM

ROBERT L. TAYLOR, District Judge.

[1] Plaintiffs seek to dismantle the Knoxville school system and to substitute therefor what they refer to as a unitary system. A unitary school system is one "within which no person is to be effectively excluded from any school because of race or color." Alexander v. Board of Education, 396 U.S. 19, 20, 90 S.Ct. 29, 30, 24 L.Ed.2d 19; Northcross v. Board of Education, 397 U.S. 232, 237, 90 S.Ct. 891, 25 L.Ed.2d 246 (1970), (concurring opinion).

This litigation has a long history.[1] In its present posture, the suit involves a motion by plaintiffs filed November 17, 1969, shortly after the decision in Alexander v. Board of Education, supra, for immediate relief. Preliminary proceedings[2] resulted in an order limiting proof on the merits to specifically alleged discriminatory developments since the last decision in the suit on June 7, 1967. These developments concerned the alleged gerrymandering of neighborhood school zone, faculty employment policies, and the policies governing the location of new educational facilities.[3]

When this suit was instituted on December 11, 1959, the Board of Education had maintained de jure segregation in the schools since 1870. After the mandate in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), the Board had considered some eight plans of integration, without judicial proceedings, but none was adopted. The 1959 plan proposed to the Court was a grade-a-year-plan. One feature of Plan 9 was:

> "4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated."

These zones were discussed in the Court's 1960 memorandum.

> "In implementation of the Plan filed on April 8, 1960, the Superintendent testified that he instructed his Staff to begin work on a zoning map which was approved at a meeting of the Board on August 6, 1960, just two days before the hearings began. He testified that he instructed his Staff that in the preparation of the map there would be no maneuvering or gerrymandering, that the rezoning and re-establishing of school zones must be based on enrollment studies and on the size and capacity of the buildings. The work was in charge of

1. The report at 270 F.Supp. 903 (D.C. 1967) traces the history of the suit and the history of desegregation in the schools. Memorandums styled Goss v. Board of Education are also reported at 186 F.Supp. 559 (D.C.1960); 301 F.2d 164 (6 Cir. 1962), 305 F.2d 523 (6 Cir. 1962), 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963) and 408 F.2d 1183 (6 Cir. 1969).

2. A hearing on December 12, 1969 was postponed due to a commitment of plaintiffs' counsel. Defendant filed a motion to dismiss January 30, 1970. All motions were heard on March 16, 1970, and an order entered April 3, 1970 limited the scope of the proof on the merits.

3. Proof was heard April 21, 1970, and the parties were ultimately granted 50 days to file briefs.

Mr. Frank Marable, Supervisor of Child Personnel, whose duty it is to check on attendance, school zones and the movement of people.

"On cross-examination, he testified that in preparing the map, efforts were made through the pre-school round-up program and estimates of principals to get estimates of the number of children that would be affected. This zoning plan was confined to the elementary schools and did not include the secondary schools.

"Under detailed cross-examination, Mr. Johnston pointed out that small groups or pockets of Negro homes were scattered throughout the Knoxville City School System in contrast to major concentrations of Negro citizens; that the zone boundaries were often dictated by artificial barriers like heavily traveled streets and also by the size and capacities of school buildings.

* * * * * *

"He testified categorically that no member of his Staff in working on the map had ever operated deliberately to cut out Negro children; and that they tried to work the thing out on a fair basis, depending on the size of the building, shifting population and enrollment."

On appeal the zones were approved by the Court of Appeals, 301 F.2d 164 (6 Cir. 1962), and the Supreme Court did not grant certiorari on this issue. 371 U.S. 811, 83 S.Ct. 38, 9 L.Ed.2d 53 (1962).

In 1967, this Court stated:

"This brings us to a third issue, namely, whether the Board has operated the plan as modified to promote segregation in violation of the Fourteenth Amendment.

"The items which plaintiffs raised under this issue were many. They contended that the zone lines were made to promote segregation. These lines were in the plans that were approved by this Court and were reviewed by the Sixth Circuit on at least two appeals and presumably were either not attacked or were impliedly approved by the Supreme Court of the United States when it considered and remanded the case to the Court of Appeals by holding that the transfer plan involving the minority-majority rule was unconstitutional. This day is late for making a claim that the zones are unconstitutional because they promote segregation.

"The Knoxville School System is known as the neighborhood system. The neighborhood school has been approved by various courts, including our own Circuit.

"The great and convincing preponderance of the proof shows that the zones were not made to promote segregation. The effect of the testimony of Dr. Osborne was that the zones were not intentionally gerrymandered, but that in many instances they promoted segregation.

"Doctor Adams stated that the zone lines were designed to fill school buildings * * *"

The evidence presented at past hearings showed, and the Court finds, that there was no gerrymandering of the zones before 1967. The Board has continued to use the same criteria in establishing zones since 1967. In answers to interrogatories, it stated:

"The major criteria used in drawing up boundaries for school zones [are]:

"(1) Capacity of existing school structure;

"(2) Existing safety hazards in immediate area;

"(3) Physical proximity of students to the school (neighborhood school)."

The Board admitted that zones were reviewed annually and that changes had been made since 1967. Consequently, the Court heard proof to determine if the Board had continued to follow its approved policy.

Doctor Fred Bedelle, Jr., the Assistant Superintendent in Charge of Personnel

and Development, was the defendant's only witness. An employee of the defendant since 1963, he recruits and assigns teachers and is in charge of pupil services and assignments. Initially, he explained changes in the elementary schools.[4] There was a one block change in the Chilhowee zone in 1967 when a new road was opened. This had no effect on the racial composition of the school in 1967. Chilhowee had 721 white students in 1967. In 1969, 640 white and 42 Negro students attended that school.

In 1967, adjustments were made in the Belle Morris, Brownlow and McCallie zones. Land condemnation for Interstate 40 had eliminated some residential housing, and the changes compensated for classroom vacancies. Dr. Bedelle testified that some 80 pupils were involved and that there was some change in the racial composition of the schools involved because the housing in these areas was integrated.

The Beaumont zone was moved one block north on the north side to eliminate overcrowding at Lonsdale, the adjacent zone, and to avoid traffic hazard from an access route to I-75.

In South Knoxville a change in the high school pupil assignment was responsible for some elementary school shifting in 1968. Certain students from Young High, a city school with grades 9-12, were shifted to Doyle High, a newly constructed county school. Some Young students were shifted to South High. To utilize vacant space at Young, it was changed into a 7-12 grade school. Grammar schools in the area which were formerly 1-8 were converted into 1-6 systems. Three and four block adjustments in the Galbraith, Giffin and Flenniken zones were made to balance classroom capabilities. The grammar school zone changes involved less than 75 students and had no effect on the racial composition of the student bodies because the schools, reflecting residential housing, are almost exclusively attended by white children. In 1969, eight of the 1018 children who attended these schools were Negro. Similarly, the changes in Young High had no effect upon the racial composition of the student bodies involved.

Doctor Bedelle stated that all elementary school zoning changes involved between 200-250 students and had "very little effect" upon the racial mixture of those schools.

As the previous discussion concerning Young High implies, there were more significant changes in secondary school zones. The opening of new schools was mainly responsible for the changes. Northwest Junior High (7-9) opened in the Fall of 1968. Ridgedale, Pleasant Ridge, West Haven, and Norwood were changed from 1-8 into 1-6 systems. Seventh and eighth grade students from those schools, some ninth graders who had attended Central High, and some county students formerly assigned to Powell High made up the Northwest student body. In 1969, two of the 999 students were Negro. The student body reflects the composition of the residential housing in the area. Zone changes did not affect integration.

Bearden Senior High (10-12) opened in the Fall of 1969. The Former Bearden campus had contained a 1-8 and a 9-12 system. The former campus was changed into a K-6 and a 7-9 system. Cedar Grove and West Hills Elementary were changed from 1-8 into 1-6. Those seventh and eighth graders were assigned to Bearden Junior High. The Bearden zone was contracted and straightened on the north and east sides. These zone adjustments and the opening of the new Bearden school relieved pressure caused by overcrowding at all these

4. Apparently, Knoxville schools are organized or are being organized into a 6-3-3 system, but significant deviations exist. Although the Court recalls no testimony on the issue, defendant asserts, and the interrogatories support that assertion, that before the 1963 annexation city schools were in a 6-3-3 grade system. Annexed county schools used the 8-4 system. The 8-4 schools are being phased out as new schools are built.

schools and allowed removal of some temporary classrooms. There was no effect on racial composition of schools in the involved zones since changes were made in areas involving near exclusive white residential patterns.

A slight change was made in the West High zone on the west side to adjust the zone for irregularities created by the old city boundary of Knoxville.[5] West changed from a 9–12 to 10–12 in 1968 when Northwest Junior High was opened. In 1967, 1968 and 1969, 39, 26 and 32 Negroes, respectively, attended West.

There was a 1967 adjustment of the zone between Whittle Springs Junior High and Park Junior High. The Park zone was increased on the north to include areas that were formerly in the Whittle Springs zone. Dr. Bedelle explained that the change relieved overcrowding at Whittle Springs and added students at Park where existing facilities were not being fully utilized. There is no numerical evidence before the Court of the racial composition of these two schools in 1966 before the change occurred.

Austin High was the Negro high school under de jure segregation. Currently Austin offers extensive vocational courses while academic courses for this area are taught at East High. In 1968, zone lines between the two schools were abolished. The particular curriculum chosen by the student determines where he attends. There are shuttle buses for necessary class interchanges. In 1967, before abolishing the zone lines, Austin (10–12) was attended by one white and 442 Negroes; East (9–12) had 294 whites and 342 Negroes. In 1969, ten whites and 739 Negroes attended the combined schools.

On cross-examination, plaintiffs vigorously attempted to develop the idea that not changing the boundary lines would also produce gerrymandering. Under this theory, evidence was heard which attacked the validity of zones approved in the past and most of the other facets of pupil assignments. Special emphasis was given to Rule High and the feeder schools in that area. Rule is a 7–12 system with a 1200 capacity. In 1967, 1264 whites and 142 Negroes (206 overcapacity) attended there; in 1968, 1172 whites and 173 Negroes (145 overcapacity) attended; and in 1969, 1120 whites and 244 Negroes (164 overcapacity) attended. Nearby, Beardsley Junior has grades 7–10 and a 750 capacity. It is the only school in Knoxville with this grade structure. In 1967 of 498 pupils, 11 were white; in 1968 four of 416 were white; and in 1969 four of 361 were white. Plaintiffs contend that failure to adjust these zones lines to fill the Beardsley vacancies shows that the present lines perpetuate segregation. Dr. Bedelle stated that there had been staff studies of the area, but that he was not sure what recommendations had been made. He stated that 6–8 portable classrooms would be necessary for Beardsley to accommodate all of the students in 7–9 grades in this area. He did not state what impact this change would have on Rule.

Doctor Bedelle testified that the Board had not considered pairing any schools. Plaintiffs pointed out from data taken from interrogatories that if existing racial patterns were maintained, pairing would produce an almost equal number of white and Negro students in certain schools. Lonsdale and Sam E. Hill are two of the schools plaintiffs mentioned. These schools are not far apart and have grades 1–6. Lonsdale has a capacity of 560 and 48 of the 423 students are Negroes. Sam E. Hill, a former all-black school, has a capacity of 540 and four of the 351 students are white. West View and Cansler are similar but defendant maintains that the railroad and major traffic artery dividing the section makes pairing dangerous.

Plaintiffs also contend that the Park Junior and Vine Junior zones tend to promote segregation because Magnolia

5. In 1963, Knoxville annexed considerable adjacent property.

Street, the four-lane highway that divides the two zones, has a black residential pattern to the south and a white pattern to the north. In 1969 of 633 students at Vine, five were white. At Park 235 were white and 274 were Negroes. In this connection, Dr. Bedelle stated, in effect, that the mixing or non-mixing of races was not the most important factor in locating a zone's boundary. In this particular instance he felt that locating the boundary line on this major traffic artery was consistent with all the past experience of the Board.

Plaintiffs' proof, in addition to the interrogatories, consisted of testimony of Dr. John H. Croghan, an Assistant Professor of Education at The University of Miami. His principal classroom duties consist of instructing potential principals in administration. Many of his duties as a professor involve the establishment and implementation of school integration plans.[6] The Court understands he has authored or participated in drawing plans involving 17 Florida counties. The Defense Fund [7] employed him to testify in Knoxville. In answering a series of questions eliciting his familiarity with the Knoxville schools, he stated that he had studied defendant's responses to the interrogatories for three days. The hearing was the occasion for his third trip, each of two days duration, to Knoxville. In attempting "to get a feel of the school system" he had examined one-half of the school buildings, at least to the extent of driving past them in an automobile. He had talked with one member of the Board and with other assistant superintendents, principals, teachers, guidance counselors, and community leaders, especially in the black community.

In defining the terms he used, he stated that "effective desegregation" existed when no school could be racially identified by the composition of the students or faculty. In other words, since 16% of the students under defendant's control are Negroes, then 16% of each student body should be composed of Negroes. Under this definition there is no effective desegregation in the Knoxville schools. Dr. Croghan introduced Exhibit 12 which shows that 83% of the Negro students in Knoxville attend schools that have student bodies composed of over 50% Negroes. Almost seventy-eight percent of the Negro teachers teach at schools where over 50% of the student body are Negro.

Doctor Croghan made general observations about the Board's policy. On gerrymandering, he expressed surprise over the Board's failure to maintain a "pupil locator map." The Court understands that such a map would fix all the residences in Knoxville and show the race, number and age of pupils residing therein. Without such a map the witness stated that definite conclusions about gerrymandering were difficult to make. There are possible changes in zones which will alter existing racial composition at schools. For example, boundary lines for the Austin-East feeder schools could be redrawn.

Other factors which would also change the racial composition but leave it short of the desired 16% were mentioned. If certain elementary feeder schools were changed, racial composition at secondary schools would change. One hundred eleven of the 122 portable and temporary classrooms used by defendant were located at schools where the student body was generally white. Dr. Croghan felt that expanding capacity at these schools while leaving existing capacity at some predominately Negro schools under-utilized, showed an intent by the Board to perpetuate segregation. His

6. The federal government pays one-half of Dr. Croghan's salary. He is a "Title IV" employee under subchapter IV of the 1964 Civil Rights Act dealing with "Public Education." 42 U.S.C. § 2000c et seq.

7. See N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) for organizational heirarcy.

remedy was to enlarge the zones at schools with available space. In this respect, he also mentioned that the grade structure at Beardsley (7–10) was forced in order to hamper integration. It was his further opinion that the existence of special course offerings at various schools promoted segregation. He was especially critical of the variation in curriculum at Fulton High (1,213 white—115 Negro—1969) and Austin-East (10 whites—739 Negro—1969), the vocational schools that defendant operates.

The trust of all of plaintiffs' contentions is that if any school in the system can be identified by race, then a dual system exists. Applied to Knoxville, it is asserted that this situation can be remedied by assigning 84% white students and 16% black students at all schools. In a closely related proposition, plaintiffs assert that the goal of all the Board's actions in the pupil assignment area should be to mix more students racially. Specifically, plaintiffs say that failure to establish zone lines that would achieve a higher percentage of racial mixing is improper. Plaintiffs contend that portable classrooms are used at predominately white schools to absorb student overloads instead of adjusting zones to assign these students at predominately black schools where the necessary facilities exist. Plaintiffs also contend that the Board should pair schools to achieve more racial mixing; that the transfer system is unconstitutional especially with the demonstrated result at Austin-East; and that the feeder school system is operated in a discriminatory way to prevent or retard racial mixing. (None of the last four contentions was made in the initial motion for immediate relief.)

The Board's position is that it was maintaining a consitutitionally acceptable policy in 1967 when this Court approved its policy and that it has continued its operations under that plan which was later affirmed by the Circuit Court. It denies assigning any students to perpetuate segregation.

In approving the Board's plans in 1967, this Court dismissed the suit because it was of the opinion that the schools in Knoxville were racially desegregated. Plaintiffs have urged in these proceedings that the effect of later decisions, especially *Alexander*, supra, is that if any school is racially identifiable, then the system is not desegregated. There appear to be racially identifiable schools under the Board's control due to the housing patterns of the neighborhoods.

[2] Fundamental to the legal questions raised by the recited facts is the constitutionality of neighborhood schools. Plaintiffs' overriding contention is that the neighborhood schools violate the Fourteenth Amendment. In the opinion of the Court, neighborhood schools are constitutionally sound. The *Brown* mandate, supra, as applied by this Court in 1967, Goss v. Board of Education, 270 F.Supp. 903, and as modified by the 1968 school cases, Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed. 2d 716; Raney v. Board of Education of Gould School District, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727; Monroe v. Board of Commissioners of City of Jackson, 391 U.S. 450, 88 S.Ct. 1700, 20 L. Ed.2d 733, and *Alexander*, supra, in 1969, and *Northcross*, supra, in 1970, has not abolished the neighborhood school. See *Northcross*, supra, especially the concurring opinion of Mr. Chief Justice Burger. The Sixth Circuit approved of neighborhood schools when it reviewed this case in 1969, Goss v. Board of Education, 406 F.2d 1183, and has more recently reiterated its position in a case dealing with the Cincinnati schools. Deal v. Cincinnati Board of Education, 419 F.2d 1387 (December 9, 1969). That opinion, which this Court must follow, stated:

"In our opinion in the first appeal, we said:

"'The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so

> because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication.' (369 F.2d [55] at 60)
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> "Appellants contend that housing patterns in Cincinnati are segregated as a result of actions of both public and private agencies, and that the School Board 'may not close its eyes to this reality' but should remedy it. We are not told how or by what lawful authority the School Board can remedy the housing patterns of a neighborhood. Perhaps what appellants want is for the Court to order the Board to provide buses to transport children to other school districts where they do not reside, construct additional schools in such other districts where necessary to accomplish this purpose, and abandon the existing neighborhood schools. We find no basis to enter any such order.
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> "Boards of Education can hardly be blamed or held responsible for neighborhood residential patterns.
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> "In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young. Nor should such burden be saddled upon the owners of real property who are taxed in Ohio to provide funds for the operation of public schools • • •" 419 F.2d pp. 1391, 1392

[3] There is no evidence in the record that the Board has made changes for racial reasons. The contention that the Board has an affirmative duty to change the zones to increase racial mixing is not well founded.

[4] In a related area plaintiffs spend considerable time developing the facts about the Rule and Beardsley areas. The Court finds that in the areas served by Rule and Beardsley the Board has not acted in accord with its stated policy of drawing zone lines to conform to the capacity of existing school structures. In 1969, the 1200 capacity Rule School was attended by 1364 students. Beardsley with a 750 capacity was attended by 361 students. The Board has asserted in supplemental proposed findings of fact that the calculations found in the answers to interrogatories concerning school capacity were mechanically determined by multiplying the number of classrooms by the number of students who can utilize a typical classroom. Since all classrooms are not uniform, it is asserted that the given school capacities may be erroneous. The Court accepts this contention to a limited degree because there was no allegation concerning classroom utilization and the Board was not prepared to present other than general data on the subject. Acceptance of the Board's contention does not entirely explain the disparity in these zones which has sharpened since 1967. Accordingly, the Board is directed to revise the zones in this area for the 1970 school term to eliminate overcrowding at Rule and to utilize existing capacity at Beardsley. This revision may or may not continue the present grade structure at Beardsley.

In view of the foregoing direction, during its annual revision of zone lines, the Board may wish to pay considerable attention to the 1,000 capacity Holston High where attendance has increased from 1,093 in 1967 to 1,289 in 1969.

[5, 6] The controversy concerning the use of portable classrooms was developed at trial. There was no allegation of their use to perpetuate segregation and the Board offered no proof on the subject except for the statistical data supplied in answers to interrogatories.

The Court understands that portables are used as a temporary expedient in neighborhoods which are so overcrowded that construction of additional facilities is projected by the Board. For instance, the Board reacted to the westward population shift by constructing Bearden Senior High. In the interim period "portables" were used. At the Bearden complex, West Hills, and Norwood, 32, 26 and 19 portable classrooms were used respectively in 1967, 1968, and 1969. In 1969, the Board used a total of 48 portable classrooms. The Court observes that the zones where portables were used were not contiguous to zones with unusual unutilized capacity. Exhibits before the Court show capacity which is assumed to be the maximum capacity as opposed to the optimum capacity. Exhibits also show some unutilized space at many of the schools in the system. The use of portable classrooms is a decision within the Board's administrative expertise, and the evidence does not show that "portables" were used in violation of plaintiffs' rights under the Fourteenth Amendment.

[7] The Board asserts that the junior and senior high schools depend upon a feeder system for enrollment. Plaintiffs say that the feeder system does not promote desegregation.[8] The evidence is insufficient to support this contention.

The transfer policy has been the subject of much controversy during prior litigation. The Board presently allows transfers for the following reasons:

1. Continued enrollment of students in their present schools until completion of the grade requirements of said school.
2. Hardship imposed upon parent(s) and/or child.
3. Availability of vocational offering approved for the student.
4. Educational program level (accelerated, average, slow learners, SMR) as recommended by the Assistant Superintendent for Instruction.
5. Capacity of the school plant or availability of classroom space.
6. Medical or physical handicap.
7. Emotional difficulty in adjusting to a specific school situation.
8. Administrative reassignment due to disciplinary action.

Plaintiffs have asserted that this policy is used to perpetuate segregation in the Knoxville schools. Pointing to the facts concerning the Austin-East zone, plaintiffs say that the Board has allowed informal transfers at will. From the facts recited in the Order of May 12, 1970, it appears that there is some irregularity in the administration of that policy. Transfer irregularities were not alleged, and the defendant did not submit evidence of the number of students who attend schools out of zone and the reasons therefor. Plaintiffs asked for this information in their initial interrogatories, and the Board has never supplied an answer. Parenthetically, the Court was not aware of this fact when it ruled upon post-trial objections to interrogatories seeking similar information. In light of the former history of this suit the Board has committed a grave omission in failing to either enforce its transfer policy or to maintain records to show that enforcement. Failure to provide the requested information is difficult to excuse. Approval of neighborhood zones is specious when informal transfers occur. For this reason the Board is ordered to keep adequate records to show enforcement of its

8. In examining proposed findings submitted by the parties, the Court sees that some confusion has developed on this point. Beardsley Junior High is cited as an example of a bad feeder system. Exhibit IX answering Interrogatory 18 omitted the feeder systems for Beardsley and Bearden Junior Highs. Map exhibits show that Rocky Hill and West Hills feed into Bearden. Beardsley is fed by Cansler, Maynard, and Moses Schools.

transfer plan and to allow plaintiffs to inspect such records at reasonable times.

Plaintiffs alleged that the Board had continued segregation and racial discrimination in the assignment, hiring and discharge of principals and faculty. Exhibit IV to interrogatory 9 shows that the Board employs nine Negro and 59 white principals.[9] Dr. Bedelle explained that his staff was responsible for the screening of principal applications. Among other things a state certification is necessary for qualification. He expressed his opinion that any competent principal regardless of race could administer an integrated school. After the preliminary screening the Board, an elected body, actually selected the principals. Dr. Bedelle did not know what motivated their choice. In this connection, it was shown that the Board's membership had been enlarged from five to nine in 1969 and that a Negro lady was a member of the Board.

Doctor Bedelle testified that no principal had been transferred solely for racial reasons. In 1969, a Negro replaced a white principal at Park Junior High (274 Negroes—234 whites—1969). During the consolidation of Austin and East, the Negro principal at Austin became coordinator of federal projects. A younger white principal was transferred from Christenberry Junior High to head the combined schools.

In 1969, the Board employed 1429 white and 229 Negro teachers. Thirteen percent of the 1969 teachers were Negroes while 16% of the students were Negroes. Dr. Bedelle stated that integrated faculties were beneficial. While he testified that the Board was making a concerted effort to hire qualified Negro teachers, only four of the 39 new teachers hired in 1969 were Negroes. In explanation he stated that the Board had received a disproportionate number of qualified applicants from prospective white teachers.

Assignments of teachers are closely related to hiring. Teachers are hired with the intent to put them in specific vacancies. Vacancies may arise when a teacher leaves the system, requests reassignment (transfer) or when a school is expanded to require a new teacher. Vacancies are filled to achieve a biracial mix in a school's faculty, but no assignments were made solely for this purpose. Many factors are significant in assignments. A teacher's request for assignment or reassignment is granted when possible to maintain employee morale. A conflicting policy is the Board's desire to retain teachers at the same school, especially at elementary schools. The theory behind the policy is that teacher continuity facilitates community interest and aids the parent-teacher relation. It was also pointed out that elementary teachers were easier to assign than secondary school instructors because their job skills were less specialized. In addition to academic qualifications and state licensing requirements, Dr. Bedelle stated that a certain factor, intangible to some extent, guided hiring and assignments. The strengths and weaknesses of various departments of a faculty and personality cohesiveness among existing and potential faculty members are considered. These factors, he felt, explained why there were no transfers solely on account of race. Furthermore,

9. EXH. IV names 68 principals. For statistical purposes the Court has had some difficulty in determining how many schools are controlled by the Board. In an affidavit filed February 17, 1970, attached to a brief, plaintiffs' attorney deposes there are 65 schools. In EXH. I to interrogatory 1, defendant has listed 70 schools. Among these are Elmwood which the Court understands is consolidated with Beaumont and has no principal. Also included among these 70 are Juvenile Home, Knoxville Adult Center, Knoxville Evening High and the State Area Vocational Tech. The Court will treat the system as having 65 schools, eliminating Elmwood (its figures are consolidated with Beaumont). Knoxville Evening High, the Adult Center, the State Area Vocational Tech, and Juvenile Home. Student composition at these schools apparently is not determined by racial considerations.

it was his opinion that a summary transfer solely for racial reasons would adversely affect teacher morale and job performance.

Doctor Croghan was critical of the Board's policy of maintaining consistency in faculties which serve neighborhood schools. Any advantage of faculty continuity in its present character is neutralized by the adverse effect of racial imbalance. A pre-service orientation can condition teachers to work effectively in neighborhoods with which the teachers are unfamiliar. Dr. Croghan had participated in a human relations orientation of this nature which only took three weeks to conduct in Dade County, Florida. In concluding this line of testimony he introduced Exhibits 16 and 17 which show that by reassigning 136 elementary and 116 secondary teachers, defendant's faculties could be balanced in a racial sense, i. e., 13% Negro instructors at all schools.

[8] The Board first integrated its faculties in 1965. The number of integrated staffs has risen steadily; there were 11 in 1965, 35 in 1966, 37 in 1967, 41 in 1968 and 44 in 1969. Plaintiffs contend that black teachers, who are 13% of the teachers employed by the Board, should be assigned to avoid having schools identified by the race of the faculty. Plaintiffs also contend that assigning black principals only at predominately black schools is also improper. In the alternative, plaintiffs say that the present pace of faculty integration is too slow and in reality represents only token integration. The Court finds that since the 1965 decision in Bradley v. School Board of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187, the Board has made a good faith effort to integrate faculties. Dr. Bedelle, who was in charge of faculty assignments, stated unequivocally that integrated faculties were beneficial. The effect of his testimony was that the Board recognized its duty to integrate, and while not actually ordering a teacher to transfer for racial reasons, encouraged transfers that resulted in faculty integration and exercised some discretion to achieve that result. The Court finds that the Board is fulfilling its duty in the integration of teachers in the Knoxville system. Shifting of professional employees cannot be done like the moving of furniture. In that context, it is observed that 109 of the 252 teachers to be reassigned under plaintiffs' plan to achieve racial equality are black. This movement of almost 50% of the black teachers employed by the Board would result in a very large turnover of suspected disruptive proportions in schools where the percentage of black teachers is great.

[9] In view of *Alexander*, the Court is constrained to find that the Board should accelerate the integration of faculties. At the same time, it is observed that no opinion has clearly defined the extent of this duty. See United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969). The Board is reminded that the choice of the teacher does not have much weight in this area. Monroe v. Board of Commissioners, 380 F.2d 955, 960 (C.A.6, 1967). As a further guideline the Board should note the language ordering a school board to "employ, promote, and assign faculty and other personnel 'in furtherance of a goal of removing the former racial identity of a school.'" Monroe v. Board of Commissioners, 427 F.2d 1005 (C.A.6, June 19, 1970).

[10, 11] The Court finds that the evidence is insufficient to support charges of discrimination in the hiring and discharge of teachers or principals. The Court further finds that the Board has not discriminated in the assignment of principals. In consideration of the magnitude of principals' duties, the Board should have considerable latitude in assigning principals. There are no black principals at predominately white schools. A black principal did replace a white principal at Park School (274 black—234 white—1969). A white principal also replaced a black principal at the combined Austin-East School. There is no evidence to show that the

Board abused its discretion in the assignment of principals.

Plaintiffs alleged that the defendant was perpetrating a racially segregated school system by locating new schools or adding to existing schools in residential neighborhoods which were predominately white or black, thereby creating racially identifiable schools. Proof on this issue was limited to schools which were not in the planning or construction stage on June 7, 1967 since a prior decision was made on the same issue adversely to plaintiffs' contention. Goss v. Board of Education, 6 Cir., 406 F.2d 1183, 1186. Answers to interrogatories show that only four schools have been expanded or plans begun for expansion since 1967. New construction at one of those four schools, Bearden Junior High, was limited to the renovation of two shops before the 1969 term. The $31,000.00 cost is considered de minimus. Expenditures had been made on other schools, but these expenditures were considered to be in the form of normal operating costs rather than expanding existing capacity. For instance, "heating corrections" at Park Junior High were completed between 1964 and 1969 at a cost of $43,-800.00.

Planning was begun in September, 1969, to build an elementary school (1–6) with a 600 student capacity in East Knoxville. The location of the school has not been fixed, but the Board has three sites under consideration at present. The Court understands the testimony to be that the location will be east of a North-South line drawn between Fair Garden and Robert Huff schools.

Several reasons were given in support of the proposed locations. Immediately east of the downtown commercial center and north of the Tennessee River, an extensive urban renewal project has been conducted in the past several years. The effected area was in one of the two major localities where Negroes reside in Knoxville. Much residential housing was razed, forcing a population shift. In contrast to white patterns, Negro shifts radiated eastward from the downtown area with Magnolia Avenue being generally maintained as a northern boundary of the Negro community.

This forced population shift has disrupted traditional attendance patterns in nearby neighborhood school zones. For example, Green School (1–6) with a 750 student capacity is now near no residential population center. Attendance tapered from 469 in 1967 (23 white) to 365 in 1968 (8 white) to 281 in 1969 (5 white). Resources at schools in adjacent neighborhood zones have become burdened. So much overcrowding developed at Eastport that the sixth grade was transferred to Green. The remaining 1–5 grades had 442 students in 1969. Eastport's capacity is 452. The East Knoxville situation is further complicated by the physical deterioration of the Mountain View School (1–6). In 1969, 303 Negroes were enrolled in this school which has a capacity of 360. Dr. Bedelle testified that the decision had been made to close Mountain View in the 1970 term and shift these students to Green. Future plans propose closing Robert Huff (1–8) and assigning those students to the new school. In 1969, 307 white and 88 Negroes made up a total student body of 395 at Robert Huff. The capacity for 1969 was 399.

Plaintiffs contend that current population shifts would shortly result in an all Negro school; that the school should be located in an area where long range forecasts indicate stability in white residential patterns, thereby maintaining a racial mixture among the students. Dr. Bedelle expressed hopes that the new school would be equally divided racially, but he did not assure the Court of any definite mixture. He testified that there is a theory among education administrators called the "tipping effect" which posits that once a school is attended by 35% of a minority group, students at the school will shortly become exclusively members of the minority group as the other group flees the area. Dr. Bedelle based his hopes that the "tipping effect" would not be operative

in East Knoxville upon two considerations: completion of the urban renewal project may end violent population shifts; and the Board has proposed construction of a very modern school which may tend to hold whites in the area.

The present Central High is one of the older schools that the Board maintains. It has a 1400 student capacity, and these students are in grades 9–12. Twelve portable classrooms have been used there since 1967. A recent cave-in of a wall has made some ten classrooms inoperable. A new school to be called Central, located approximately ¾ miles from the old plant, was about 65% completed at the date of trial. It will furnish facilities for students in grades 10–12 and have a capacity of 1,500. The present Central High School Building will be used as a junior high school thereby relieving all feeder schools. These feeder schools are on the periphery of the city. Some seven Negroes are anticipated to be in the senior high student body when it begins operations about January, 1971.

The Board had purchased the Agee Building adjacent to West High and remodeling there cost $335,000.00. The answer to interrogatory 12 (EXH. V) recites the project is incomplete. Change will apparently only streamline the present operation of West High and not increase the student capacity.

Plaintiffs also pointed out that Northwest Junior and Bearden Senior Highs were also located on the periphery of the city. Planning for the Bearden School was begun in September, 1966; construction began at Northwest on October 21, 1966. Neither of these schools were included in the April 3 Order. In 1969, Bearden Senior High had 22 Negroes in a student body of 1,035; there were two Negroes in the 999 pupils at Northwest. Residential communities surrounding these schools are almost exclusively white.

Doctor Bedelle was cross-examined at some length about the location of new schools. Schools, he explained, were built where student population exceeded the capacity of existing schools. New construction had recently been on the periphery of the city. There was a very heavy increase in the number of school age children in the newly built suburban neighborhoods in West Knoxville. This fact was also evident, but to a lesser extent, in the older neighborhoods around the new Central High School in Fountain City (North Knoxville). When construction was necessary, schools were located as centrally to the students as possible. One factor complicated the actual pinpointing of a school. While possessing condemnation powers, for economic reasons, the Board sought unimproved land, but sites with twenty to thirty acres (the size of the Bearden Senior High campus) were not always readily available in fast developing residential areas.

Doctor Croghan testified that locating new schools on the city's periphery promoted segregation. If all newly constructed schools are located near the inner city, integration, disregarding transportation cost, will be promoted. One cultural advantage flowing from such a location of schools is the displacement of underprivileged children from inner city schools into schools attended by suburban children. Location of only one of several schools near the inner city, like the proposed grammar school, tends to perpetuate segregation, for anticipated residential housing changes will result in racially distinguishable schools.

[12] The Court is of the opinion and finds that schools have not been built to perpetuate a dual system. The Board has established and followed building principles consistent with the neighborhood school system which this Court approved in 1967.

[13] After examining plaintiffs' contentions in the present case, practically all of which were considered in an exhaustive opinion of June 7, 1967, 270 F.Supp. 903, the Court is of the opinion

and finds that the defendant School Board is operating a unitary school system as defined by the Supreme Court in the case of *Alexander*, supra, and that its motion for immediate relief in the form of an injunction must be denied.

Barbara LANE and Evelyn Costen, as individuals and on behalf of all other persons similarly situated, Plaintiffs,

v.

William McGARRY, individually and in his capacity as Director of the Syracuse Housing Authority, and Syracuse Housing Authority, and Charles Urstadt, Commissioner of the Division of Housing and Community Renewal of New York State, Defendants.

No. 69-CV-484.

United States District Court, N. D. New York.

Sept. 1, 1970.

Action by applicants for low cost public housing for declaration that regulation and resolution of Syracuse Housing Authority which required residence in state for one year immediately prior to application for public housing was unconstitutional. The District Court, Port, J., held that resolution and regulation of Syracuse Housing Authority which required residence in state for one year immediately prior to application for public housing were not unconstitutional as violative of equal protection clause.

Order in accordance with opinion.

1. Constitutional Law ⇐83(1)
Municipal Corporations ⇐717
Syracuse Housing Authority requirement of residence in state for one year immediately prior to application for public housing did not constitute penalty on exercise of applicant's constitutional right to travel from state to state nor unreasonably burden or restrict the movement. U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐91
Requirement of Syracuse Housing Authority of residence in state for one year immediately prior to application for public housing did not constitute interference with applicant's rights to freedom of association. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐211
Resolution and regulation of Syracuse Housing Authority which required residence in state for one year immediately prior to application for public housing were not unconstitutional as violative of equal protection clause. Housing Act of 1937, § 1 et seq., 42 U.S.C.A. § 1401 et seq.; U.S.C.A.Const. Amend. 14.

Richard A. Ellison, Syracuse, N. Y., for plaintiffs.

William G. Kennedy, Syracuse, N. Y., for defendants and Syracuse Housing Authority.

Louis J. Lefkowitz, Atty. Gen. of State of New York, Albany, N. Y., for defendant, Charles Urstadt.

PORT, Judge.

Memorandum-Decision and Order

The plaintiffs in the above-entitled action are applicants for low income housing in Syracuse, New York under the jurisdiction of the Syracuse Housing Authority. In their complaint they seek the convention of a three-judge court and a judgment:

1. Declaring the regulations set forth in 9 NYCRR 1627-3.1(a) [1] and § 3.02C2 [2]

1. 9 NYCRR 1627-3.1 provides as follows:
Section 1627-3.1. Eligibility requirements in addition to income limitations.
In addition to income limitations, applicants must also meet following requirements for admission:

2. See note 2 on page 563.

Josephine GOSS et al., Plaintiffs-Appellants,

v.

The BOARD OF EDUCATION OF the CITY OF KNOXVILLE, TENNESSEE, et al., Defendants-Appellees.

No. 20834.

United States Court of Appeals, Sixth Circuit.

June 22, 1971.

Motion Denied June 30, 1971.

See 91 S.Ct. 2293.

Desegregation case. The United States District Court for the Eastern District of Tennessee, Robert L. Taylor, J., 320 F.Supp. 549, with certain exceptions, denied relief sought by plaintiffs' motion for immediate relief, and plaintiffs appealed. The Court of Appeals, O'Sullivan, Senior Circuit Judge, held that where there had not been a history of bitter contesting between city school authorities and court, federal District Court would not be directed to put detailed formula, which was set out by plaintiffs, into effect or to impose rigid timetable for purpose of bringing school system into conformity with direction of United States Supreme Court decisions to effect that neighborhood style of desegregation is not per se constitutional, but case would be remand-

ed to District Court for proceedings consistent with relevant United States Supreme Court decisions.

Remanded.

1. Schools and School Districts ⇐13

Where there had not been history of bitter contesting between city school authorities and court, federal district court would not be directed to put detailed formula, which was set up by plaintiffs in desegregation case, into effect or to impose rigid timetable for purpose of bringing school system into conformity with direction of United States Supreme Court decisions to effect that neighborhood style of desegregation is not per se constitutional, but case would be remanded to district court for proceedings consistent with relevant United States Supreme Court decisions.

2. Schools and School Districts ⇐13

Neighborhood style of desegregation is not per se constitutional.

3. Schools and School Districts ⇐141(1), 15[illegible]

Constitutional prohibition against assigning students or teachers on account of race is applicable only to minority groups.

4. Schools and School Districts ⇐13

Though existence of some all-black or all-white schools will not be struck down per se as intolerable, school authorities must justify continuance of such schools by something more than accident or circumstance of neighborhood.

Norman J. Chachkin, New York City, for plaintiffs-appellants; Carl A. Cowan, Knoxville, Tenn., Avon N. Williams, Jr., Nashville, Tenn., Jack Greenberg, James M. Nabrit, III, Sylvia Drew, New York City, on brief.

Sam F. Fowler, Jr., Knoxville, Tenn., for defendants-appellees.

Before WEICK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge.

This case has to do with desegregation of the public schools of Knoxville, Tennessee. The United States District Court in Knoxville, the United States Court of Appeals for the Sixth Circuit and, to a lesser degree, the Supreme Court of the United States have, since 1957, been attempting to come up with a plan for the Knoxville schools that will be obedient to the decision of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Such endeavor has produced the following opinions and decisions: Goss v. Board of Education, 186 F.Supp. 559 (E.D.Tenn. 1960); Goss v. Board of Education, 301 F.2d 164 (6th Cir. 1962); Goss v. Board of Education, 373 U.S. 683, 688, 689, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); Goss v. Board of Education, 305 F.2d 523 (6th Cir. 1962); Goss v. Board of Education, 270 F.Supp. 903 (E.D.Tenn. 1967); Goss v. Board of Education, 406 F.2d 1183 (6th Cir. 1969); Goss v. Board of Education, 320 F.Supp. 549 (E.D. Tenn.1970).

No effort was made to obtain Supreme Court review of the last of our above decisions. Without such effort, and on November 17, 1969, plaintiffs filed a pleading entitled Motion for Immediate Relief, which asked that "defendant be required to convert to a unitary school system *at once and without any further* delay." This notwithstanding that our last unappealed decision had held that Knoxville had already converted its schools into a "unitary school system." The District Court, however, entertained the motion. Extensive proofs were taken and another plenary opinion entered by District Judge Robert Taylor on July 1, 1970—Goss v. Board of Education, 320 F.Supp. 549 (E.D.Tenn.1970). It is this decision which is the subject of the appeal now before us.

Except for some commands as to improvement in faculty desegregation, some revision of the boundaries of some zones, some improvement in the school record keeping, and correction in enforcement of its transfer policy, Judge Taylor's

opinion and order denied the relief sought by plaintiffs' Motion for Immediate Relief. During the reception of proofs, an interim order was entered on April 3, 1970, limiting consideration to matters that had arisen since June 7, 1967. That was the date of the District Court order which had been affirmed by this Court in its unappealed decision, announced February 10, 1969. It was the District Judge's view that his decision of June 7, 1967, Goss v. Board of Education, 270 F.Supp. 903, so approved by us on February 10, 1969, Goss v. Board of Education, 406 F.2d 1183, was res judicata, or at least the law of the case, as to all matters adjudicated by the 1967 decision.

In Goss v. Board of Education, 270 F.Supp. 903 (E.D.Tenn.1967), District Judge Taylor had held as follows:

> "Since the Knoxville School System is desegregated under the plan which has been in operation since the school year 1963–64 and since the preponderance of the evidence shows that the plan is not being operated to deprive Negro students of their constitutional rights and that Negro school teachers are not being discriminated against because of their race, it is, therefore ORDERED that the various objections to the plan be, and same hereby are, denied * * *." 270 F.Supp. at 918.

In our affirmance of Judge Taylor—Goss v. Board of Education, 406 F.2d 1183 (1969)—we said:

> "We are not sure that we clearly understand the precise intendment of the phrase 'a unitary system in which racial discrimination would be eliminated,' but express our belief that Knoxville has a unitary system designed to eliminate racial discrimination." 406 F.2d at 1191.

Traditional precedents do indeed suggest that those decisions should be considered as having established the law of the case, and that the conduct of Knoxville up to June 7, 1967, as its effort to comply with Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) should not now be judicially revisited. In Judge Taylor's 1967 decision he said:

> "This case having been in this Court since 1959 and the Court being of the opinion as outlined above that the Board and school authorities are moving skillfully and with expedition toward the full integration of the Knoxville School System, that there is no further need for the schools to operate under Court supervision, it is further ordered that the case be stricken from the docket." 270 F.Supp. at 918.

However, in requiring that the case be kept open on Judge Taylor's docket, we said:

> "In the time ahead, and consistent with its need and duty to serve without discrimination its entire school population, the Knoxville Board of Education may wish to consider some pairing of existing schools and some alterations of its plans for future construction. We make no commands in this regard." 406 F.2d at 1191.

We believe, however, that Knoxville must now conform the direction of its schools to whatever new action is enjoined upon it by the relevant 1971 decisions of the United States Supreme Court.

We turn, then, to the cases of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, and its companions, all announced on April 20, 1971. Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577; North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586; McDaniel v. Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582; and Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47, 91 S.Ct. 1292, 28 L.Ed.2d 590. Since announcement of these decisions, and relying on them, appellants have filed in this and other appeals before us, what they have denominated Motion of Plaintiff-Appellants to Expedite Determination of Appeals. By

this motion, they ask that we command the District Court to order the Knoxville School Board to forthwith proceed as follows:

1) Direct defendants to file a plan *within two weeks* for the 1971–72 school year that completely dismantles the remaining vestiges of segregation within the system;

2) Direct, without fixing any specific ratios, that such plan, with respect to student assignments, move toward the establishment of a racial balance *substantially the same in each school of the system*, and in this endeavor to employ any desegregation technique necessary, *including busing;*

3) Direct that such plan, with respect to faculty desegregation, establish in *each school* a racial balance of principals, teachers, teacher-aids and other staff working directly with children which substantially reflects the racial composition of each such class of faculty within the entire system; this to be accomplished not later than the commencement of the 1971–72 school year;

4) Allow plaintiffs time to object to any plan proposed by defendants and to file an alternative plan;

5) Directing that the District Judge appoint an educational expert to assist him in arriving at a plan that will meet constitutional standards;

6) Authorize plaintiffs to retain an educational expert to assist them in preparing a plan to be submitted to the District Court, *the cost of such employment and use of such expert to be borne by the defendant school district;*

7) Direct defendants to co-operate with both experts by providing office space at the headquarters of the Superintendent of Schools with full access to all information, plans or studies concerning the system the experts deem necessary, by paying all fees and expenses of the experts, and by providing stenographic assistance, use of office machines, computers, draftsmen, telephone service, and such other professional and technical assistance as may be required;

8) Schedule a prompt hearing on the sufficiency of the submitted plans and take such necessary action as to *assure implementation of a unitary system by the commencement of the 1971–72 school year;*

9) Enjoin any new construction, expansion or abandonment of school facilities until completion of the hearing and thereafter require submission of any such plans to the District Court with notice to the plaintiffs;

10) Direct defendants to file various semi-annual reports with the District Court concerning the racial composition of the school faculties, and if in any year the overall ratio of black to white educators in the various schools does not approximate the ratio of black to white educators in the system, the district shall actively recruit black educators in filling any vacancies; information concerning busing; a description of plans for future school construction, expansion or abandonment, and a map of attendance zones, if such is the method of student assignment approved;

11) Allow plaintiffs their costs, including attorney fees.

Expanding and supplementing the foregoing which we have attempted to reduce in size, is an Appendix A, which sets out in greater detail what the school board must do to accomplish faculty desegregation. Also attached is an Appendix B, entitled "Report" which would have the District Court require semi-annual reports to be filed by the school authorities, giving extensive and detailed reports of the progress of their obedience to the directions of Appendix A.

[1] We are not advised from what material plaintiffs constructed the elaborate rules and directions set out. It is apparent, however, that they are, in substance, the commands of District Judge James B. McMillan, set out in his opinions in Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1299

(W.D.N.C.1969) 311 F.Supp. 265 (1970), with some extensions and elaborations. The opinions of Judge McMillan, 306 F. Supp. 1299, 311 F.Supp. 265, and 318 F. Supp. 786, affirmed by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), express with some asperity his pique that the school authorities had failed to fully adopt a plan constructed by an expert, Dr. John Finger, who had been appointed by the District Judge. The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg Counties. The broadness of their commands bespeak some motivation of reprisal. In the long history of the litigation we deal with, we find no such bitter contesting between the school authorities of Knoxville and the court, nor between the plaintiffs and the school authorities. We, therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the *Mecklenburg* rule, it by no means directed that its commands be obeyed everywhere. We, therefore, conclude that there is nothing in *Swann* (1971) that requires us to announce a fiat imposing on Knoxville the identical pattern fashioned by Judge McMillan for his case.

Respectfully, we read Swann v. Charlotte-Mecklenburg Bd. of Ed. (1971), as primarily a command to all school authorities in states where *de jure* segregation was once the rule, to do a better job of mixing the races and teaching staffs than they have heretofore done. We set out, however, what we think are its clear commands as well as its views as to what is desirable and permissible.

I

[2] The neighborhood style of desegregation no longer can be viewed as per se constitutional. This is so notwithstanding that such was the substantial holding of the Fourth Circuit in its 1966 decision of Swann v. Charlotte-Mecklenburg Bd. of Ed., 369 F.2d 29 (4th Cir.). It there affirmed a District Court decision—Swann v. Charlotte-Mecklenburg Bd. of Ed., 243 F.Supp. 667 (1965)—which had said:

> "Thus far it has not been held *unconstitutional* to assign children to a school on the basis of their residences in a cohesive and contiguous geographical area." 243 F.Supp. at 670 (Emphasis supplied.)

And then went on to say:

> "Whatever the Board may do in response to its own initiative or that of the community, we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of races in the school population." 369 F.2d at 32.

The concurring opinion of Judges Sobeloff and Bell quoted from their opinion in Gilliam v. School Bd. of City of Hopewell, 345 F.2d 325, 329 (1965):

> " 'The neighborhood school concept is a legitimate one, and insofar as zone boundaries are drawn without racial discrimination along natural geographical lines we agree that they may be accepted as valid.' " 369 F.2d at 34.

Such concurring opinion went on to recite their previous views that,

> "This is far from suggesting that children are to be uprooted arbitrarily and bussed against their will to distant places merely to place them with children of the other race. No such thing has been proposed or contemplated in Richmond or, so far as we know, anywhere in this circuit." 369 F.2d 34.

In this court's *first* consideration of this case—now before us for the fourth time—we held valid Knoxville's use of the neighborhood plan as a method of obeying *Brown*. Goss v. Bd. of Ed., 301 F.2d 164, 166 (6th Cir. 1962). The Supreme Court had that decision before it on certiorari but limited its criticism to a freedom of choice plan. Goss v. Bd.

of Ed., 373 U.S. 683, 83 S.Ct. 1045, 10 L.Ed.2d 632 (1963). In Goss v. Bd. of Ed., 305 F.2d 523 (6th Cir. 1962), we looked again at Knoxville's plan. The neighborhood plan of integration was not questioned there by the plaintiff. Certiorari was not sought. In 1969 we again considered the neighborhood system plan of integration. Goss v. Bd. of Ed., 406 F.2d 1183 (6th Cir. 1969). We specifically found that Knoxville's plan of neighborhood integration was constitutional. The plaintiffs did not seek Supreme Court review of that decision.

We make this review to make clear why we do not by our remand direct the District Judge to decree that the Knoxville school authorities forthwith put into effect the detailed formulae set out in the plaintiffs' current motion. We will not impose a rigid timetable for the accomplishment by Knoxville of whatever may replace or revamp the neighborhood zone plan, should the District Court consider that 1971 *Swann* requires revision. We observe no crisis in the Knoxville school system that can be met only by plans hastily fashioned to be ready for the fall term of 1971. Such effort might invite fresh attacks by plaintiffs and bring on new rounds of litigation, the expense of which, including the fees of plaintiffs' attorneys and experts, would be underwritten by the Knoxville school system. We have confidence that the District Judge will move with proper dispatch to bring about a new system that will follow the commands as well as the exhortations of the *Swann* (1971) and companion cases.

II

North Carolina State Bd. of Ed. v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) announces that any state statute or constitutional provision that forbids the transportation of school children by bus or otherwise to accomplish a better racial balancing of school population will be denied enforcement. Swann v. Charlotte-Mecklenburg, *supra*, 402 U.S. 1, 91 S.Ct. 1267 (1971), approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. It did not, however, direct that a plan of transporting school children must be a part of every new plan for improvement of the objective of desegregation.

III

[3] *Swann* (1971) makes clear that the constitutional prohibition against assigning students or teachers on account of race is applicable only to *minority* groups. Even though it has been said that the desiderata of the *Brown* rule are that we have no black or white schools—only schools—and that public officials be "color blind" in discharging their duties, until these desiderata have been accomplished race will have to be considered in arranging today's school society. In the last decision prior to *Swann* (1971) that dealt with this question—Alexander v. Holmes County Bd. of Ed., 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed. 2d 19 (1969)—the Supreme Court's opinion said:

> "Each of the school districts here involved may no longer operate a dual system based on race or color, and directing that they begin immediately to operate as unitary school systems within which *no person* is to be effectively excluded from any school *because of race or color*." 396 U.S. at 20, 90 S.Ct. at 29. (Emphasis supplied.)

In Swann v. Charlotte-Mecklenburg Bd. of Ed., *supra*, the dimension of this constitutional right is narrowed, at least until the elimination "root and branch" of the former *de jure* segregation.

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil *of a racial minority* from any school, directly or indirectly on account of race * * *." 402 U.S. 23, 91 S.Ct. at 1279.

The thought is expanded in North Carolina State Board of Ed. v. Swann et al., 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), where the Court said:

> "Just as the *race* of students must be considered in determining whether a

constitutional violation has occurred, so also must *race* be considered in formulating a remedy." 402 U.S. 46, 91 S.Ct. at 1286.

It is clear, therefore, that in carrying out a busing plan to accomplish a fixed or approximate racial balance—now clearly approved by *Swann*—some white children must be moved out of the schools of their families' long time neighborhood, solely because they are white. Likewise, it may be that some Negro children will be compelled to give up attendance at a school in which they would prefer to remain. In Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1291, the District Judge disposed of objections by both black and white to his plan in this way:

> "A correspondent who signs 'Puzzled' inquires:
>
> *'If* the whites don't want it and the blacks don't want it, why do we have to have it?'
>
> The answer is, the Constitution of the United States." 306 F.Supp. at 1293.

It would appear, therefore, that some disparate treatment in favor of racial *minorities* must be tolerated until the "vestiges" of *de jure* segregation have been eliminated. In *Swann*, 1971, Chief Justice Burger said:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown* I. The systems will then be 'unitary' in the sense required by our decisions in *Green* [Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716] and *Alexander*.
>
> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." 402 U.S. 31–32, 91 S.Ct. at 1283.

IV

[4] *Swann* (1971) fixes no formulae for what must be done or what will be acceptable in efforts to arrive at a better racial mix in the schools. It does, however, lay on school authorities the duty to take some affirmative action toward improvement. While the existence of some all black or all white schools is not struck down as *per se intolerable*, school authorities will have to justify their continuance by something more than the accident or circumstance of neighborhood. Consideration of pairing of school zones, contiguous or non-contiguous, should be given; arrangement of new construction so as to further desegregation will be a legitimate objective, not to the detriment, however, of the discharge of school authorities' total and overriding responsibilities. This we urged, but did not particularize any command, when we last remanded this to the District Court. The District Judge who has handled this case can understand the commands and admonitions that come freshly to the Courts by these latest Supreme Court decisions. We need not construct a set of rules that will provide better guidelines than did the Supreme Court in these latest landmark decisions. The Supreme Court's opinion forbids an attempt by us to dictate just what racial mix should be arranged.

> "The District Judge went on to acknowledge that variation 'from that norm may be unavoidable.' This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. *The constitutional command to desegregate schools does not mean that every school in*

every community must always reflect the racial composition of the school system as a whole." Swann et al. v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 23-24, 91 S.Ct. 1267, 28 L.Ed.2d 554. (Emphasis supplied.)

V

Swann, 1971, forbids the use of our decisions in Deal v. Cincinnati Bd. of Ed., 369 F.2d 55 (6th Cir. 1966), cert. denied 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 and Deal v. Cincinnati Bd. of Ed., 419 F.2d 1387, cert. denied because of late filing, 402 U.S. 962, 91 S.Ct. 1630, 29 L.Ed.2d 128, to justify a plan of desegregation in a state which employed *de jure* segregation until the *Brown* decision. Likewise the Seventh Circuit decision in Bell v. School City of Gary, Ind., 324 F.2d 209 (7th Cir. 1963), cert. denied 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216, may not be relied upon for such purpose. In those cases the states involved had, long prior to *Brown*, abolished state-imposed segregation. The segregation complained of in those cases resulted, not from discrimination by Boards of Education, but primarily from residential patterns over which the Board had no control and for which it was in no wise responsible. In *Deal* I and II we held that the Board could not be faulted for the socio-economic levels of our society and that the Constitution did not require the Board to take affirmative action to eradicate segregation caused thereby in order to maintain racial balance in the public schools. We construed the Constitution as prohibiting discrimination. Chief Justice Burger recognized the distinction between *de jure* and so-called *de facto* segregation in *Swann* and limited the holding to the former. We need not ponder whether this prophesies that a different rule will ultimately emerge, applicable only to states not having the remnants of *de jure* segregation.

We conclude by expressly withholding any direction of any particular timetables in which Knoxville must conform to what is directed by the latest Supreme Court opinions. With great respect for an opposite view, we are satisfied that until these decisions of 1971 there was quite respectable opinion that the *Brown* decision was satisfied by the neighborhood plan of school zoning. In a District Court opinion in Swann v. Charlotte-Mecklenburg Bd. of Ed., *supra*, it is said:

> "For years people of this community and all over the south have quoted wistfully the statement in Briggs v. Elliott, D.C., 132 F.Supp. 776 by Judge John J. Parker (who at his death was one of my few remaining heroes) *that though the Constitution forbids segregation it does not require integration.* Passage of time, and the revelation of conditions which might well have changed Judge Parker's views if he had lived, have left Judge Parker's words as a landmark but no longer a guide." 306 F.Supp. at 1294. (Emphasis supplied.)

Therefore, if it has taken the federal judiciary of this country 17 years to come up with final answers, it would be judicially arrogant for us to tell the school authorities of Knoxville to get the job done in the few months that will be available before the opening of the 1971 fall session. Plaintiffs urge that we direct the District Court and authorize plaintiffs to employ an expert or experts to draw the blueprint for obedience to *Swann's* directions. We do not know where you obtain or what creates such experts. Across the land today experts can be hired to sustain the colliding positions of the adversaries in most any contest. We will not insist that the District Judge discharge his responsibilities by resolving contests between hired experts.[1]

1. We do believe, however, that the District Court should now require the school board to prepare and maintain a pupil locater map.

The hope, or dream, that one day we will have become a people without any motivations born of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what may now remain of racial bias and prejudice.

In the first reported case involving desegregation in Knoxville, Goss v. Board of Education, 186 F.Supp. 559 (E.D. Tenn.1960), Judge Taylor in emphasizing his own awesome responsibilities said:

> "As the case has developed, the ultimate responsibility for decision rests with the Court. It alone must deal with the realities—realities with which it has had acrid experience.
>
> "If it decides wrongly, the transition toward the goal of a harmonious and unified school system—a goal to which all parties to this case subscribe—will receive an untold setback. If it decides rightly, there may well be smooth and steady progress toward full integration. Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there." 186 F.Supp. at 569.

We remand this case to the District Court for further proceedings consistent with Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, and the other relevant Supreme Court opinions announced on April 20, 1971.

The parties shall bear their respective costs on this appeal.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-661

JOSEPHINE GOSS, *et al.*,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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No. 73-661

JOSEPHINE GOSS, *et al.*,

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

The Brief of Respondents [in opposition to certiorari] fails to address the legal issues presented in the Petition, but rather seeks to portray this case as one involving only a factual question which was properly resolved below. That characterization is inaccurate and misleading.

This Court's review is essential to eliminate the existing and potential conflicts among the Courts of Appeals created by the Sixth Circuit's decision in this case, and to give meaning to the Fourteenth Amendment requirement that a unitary school system be established in Knoxville. More than fifteen years after the commencement of litigation to desegregate the Knoxville schools, and more than a decade after this Court's rejection of the city's racially based transfer plan, *Goss* v. *Board of Educ.*, 373 U.S. 683 (1963), 59% of all black children in this predominantly white system attend heavily black schools.

Finally, it is imperative that this Court review this matter to give badly needed guidance and direction to the Court of Appeals for the Sixth Circuit. The *en banc* rehearings in this case and in *Mapp* v. *Board of Educ. of Chattanooga,* 477 F.2d 851 (6th Cir.), cert. denied, 42 U.S.L.W. 3290 (November 12, 1973), have failed to resolve any of the numerous conflicts among panels of the Circuit on the question of school desegregation. District courts within the Circuit have been left without counsel for guidelines, as is readily reflected in the status of school desegregation in the various Tennessee city school systems.

I

As we pointed out in the Petition (pp. 8-10), the district court determined to deny the further relief sought by plaintiffs based upon its erroneous legal conclusions that (1) 99%-black schools are sufficiently integrated [340 F. Supp., at 717; 13a]; (2) plaintiffs' demand for further relief amounted to an attempt to achieve "racial balance" [340 F. Supp., at 727-28; 23a-24a]; and (3) Knoxville's adoption of reasonable "neighborhood school" zones (in place of the dual overlapping attendance boundaries it maintained prior to 1964-65) satisfied the school board's constitutional obligation to convert from a dual to a unitary school system, whatever the resulting student enrollment patterns [340 F. Supp., at 718, 729; 14a, 25a].

The Court of Appeals adopted or approved these legal declarations in its affirmance. Though not so explicit as the district court in indicating the acceptability of minimally integrated facilities (see Petition, p. 9 n.16 and accompanying text), the Sixth Circuit found the continued maintenance of a "small number" of racially identifiable schools in Knoxville to be valid (3a)—in spite of the

fact that seven black schools remain and there never were more than nine black schools in the system at any time.

The Court of Appeals agreed (unlike the Fourth Circuit's perceptive holding in the *Danville* case, see Petition at p. 9) that plaintiffs sought "to obtain a certain percentage of black students in each school in the system" (4a). And the court approved Knoxville's compliance with the Fourteenth Amendment with the statement that the system "ha[d] taken [some] affirmative action to improve the racial mix of the schools" (3a).

Each of these issues is of critical significance in school desegregation cases; each has been resolved by other Courts of Appeals in a manner inconsistent with the holdings of the Court of Appeals and district court herein, and each merits review by this Court. *Cf.* Rule 19(1)(b) of this Court. Yet the respondents totally decline to support the erroneous legal rulings of the courts below. Instead, they suggest that only factual questions can be presented to this Court, because the Court of Appeals summarily dismissed claims of inconsistency with its other rulings with the statement that "the proof . . . failed to establish [the basis for the results reached in the other cases]."

The Court of Appeals did say:

> . . . the appellee presented evidence . . . from which the [district] court was justified in finding that no plan involving the transportation of pupils . . . would be feasible. . . . (3a-4a)

But as we pointed out in the Petition (p. 13), the district court never made such a determination. Although it discussed some of the geographic and demographic features of Knoxville in summarizing the evidence, it made no factual findings on the subject since the court held the

system was already "unitary" and that further desegregation attempts were efforts to achieve "racial balance." Thus it is legal doctrine and not fact finding which is placed in issue before this Court.

II

Respondents minimize the fact that even after this case received district court reconsideration in light of *Swann,* 59% of all black students in this more-than-80%-white school system were assigned to identifiably black schools (Petition, at p. 7). This is unexpected in view of their admissions that zone lines have not been substantially altered since they first became effective at all grade levels in 1964 (Brief, pp. 11-12) and that at the time they received judicial sanction, this Court had not yet announced the result-oriented standards of *Swann* and *Davis* v. *Board of School Comm'rs,* 402 U.S. 33 (1971) (Brief, p. 8). As we said in the Petition (at p. 12), it is hardly surprising, given the racial residential segregation existing when this suit was brought and continuing to this day (340 F. Supp., at 716; 12a), that "neighborhood school" zones have resulted in school segregation. See *Swann,* 402 U.S. at 28.

The 1971-72 enrollment figures, enumeration of which respondents label a "static presentation," (Brief, p. 4) were not represented as current (see Petition at p. 7). They were listed, however, to emphasize the gravity of the district court's error in characterizing the school system as "unitary." The Court of Appeals compounded the error by lifting out of context *Swann's* reference to a "small number" of racially identifiable schools, and applying it to Knoxville, which has never had a "large number" of black schools. The meaning of the phrase varies with the history and circumstances of each school district: even one

such school would have been unacceptable in New Kent County, Virginia.

It is undoubtedly true that in 1971, Knoxville at long last took "[*some*] affirmative action to improve the racial mix" in its schools. It finally paired schools whose combination had been recommended years ago by the University of Tennessee Title IV Center. See also, U.S. Comm'n on Civil Rights, *Racial Isolation in the Public Schools* 65 (1967). But the continued assignment of three-fifths of Knoxville's black students to heavily black schools is eloquent evidence of Knoxville's failure to take "all necessary steps" to eliminate racially identifiable schools, in satisfaction of its constitutional obligation.[1]

III

Certainly there is a place for proper fact-finding in this litigation. Petitioners have on the several appeals of this case presented to the Sixth Circuit flagrantly erroneous findings of the trial judge. We have never succeeded in having these reviewed, either because the Court of Appeals has simply remanded the case for reconsideration (as in 1964 and 1971) or because the questions are ignored (as in 1973). For example, the district court stated that transfer forms for Austin-East High School (see Appendix A) introduced into evidence could not support the testimony of plaintiffs' educational expert witness that the school system's transfer practices had perpetuated segregation (340 F. Supp., at 725-26; 21a-22a). Not only had the district court itself previously suggested as much (340 F. Supp., at 719; 15a) but Petitioners reproduced all of the transfer forms in the Appendix in the Court of Appeals, pointing out the abundant indications that white students

[1] Appendix A hereto provides a very brief summary of Knoxville's school desegregation history.

were permitted to transfer out of the paired high schools for racial reasons.[2]

In similar fashion, the district court criticized plaintiffs' educational expert for not using the board's pupil locator data in drafting his plan (340 F. Supp., at 721; 17a) even though the court itself found the data was inaccurate (340

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[2] We summarized the transfer forms in our Court of Appeals brief as follows:

> The forms are all from white students (see master listing at A. 1567-70). There are transfer requests from 51 students—some having repeatedly sought transfers—in the Austin-East zone. Not all of the students listed as having transferred at A. 1567-70 are represented in the transfer requests; their forms may have been lost.
>
> Of the 51 students, 20 of their latest requests were approved and 29 were denied; the other two students had submitted forms unnecessarily after changing their addresses and moving into another zone. Only six of the twenty-nine white students whose requests to transfer out of Austin-East were denied remained at the school: LaVerne Cox, Mary Green, Miriam Kenimer, Larry Patty, Alan Rogers, Eursal Payne. 8 whites whose transfer forms are marked "disapproved" are shown on the master listing as having obtained transfers and subsequently been graduated from Fulton, Holston or Rule. Among these, incredibly enough, is one Brenda Keeling (A. 1597-98); in the winter of 1967 Miss Keeling's request to transfer from East to Rule
>
> > Because of the colored. They are a colored boy that is causing trouble in a way which I don't improve of; causing talk [A. 1598]
>
> was denied. In the spring of 1968 another request to transfer, this time from East to Fulton because of the "racial situation" (A. 1597) was disapproved. Yet the school system reports (A. 1567) that Miss Keeling was a Holston graduate! Another example is Miss Becky Suffridge (A. 1634), who sought a transfer because she was "socially deprived." Although it was denied, she is listed (A. 1567) as a Fulton graduate.
>
> Some of the approvals are equally interesting. Two were granted because of racial complaints (Larry and Vicki Pickens, A. 1617-20). Five other transfer requests were granted despite previous disapprovals of the same or similar transfer pleas. For example, Eddie Parton first sought transfer

F. Supp., at 713; 9a) and the school board's expert also declined to use it for this reason (A. 413-14). These and other serious factual errors made by the district court were brought to the attention of the Court of Appeals but were never addressed by that Court.

To the extent that factual matters are made relevant in this case by the correction of the legal mistakes committed below, the Court of Appeals should have set aside numerous district court findings as being "clearly erroneous."

IV

The failure of the Court of Appeals to deal with the legal and factual issues presented by the district court's ruling in this case corresponds to that Court's refusal to fashion a consistent body of school desegregation law in accord with this Court's decisions and applicable throughout the Circuit.

We pointed out in the Petition (p. 12) that the decision below conflicts with other Sixth Circuit rulings approving or ordering extensive desegregation of school systems using pupil transportation. In this respect, it is similar to previ-

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in early 1968 on the ground that it was inconvenient for him to attend East (A. 1612); his request was denied. In late spring, 1968, he again sought to change schools because of "emotional difficulty in adjusting to a specific situation" (A. 1611) (a phrase which appears with annoying regularity on many transfer forms). That was denied, and in August, 1968 he filed another request to transfer to Fulton because he "wants to learn a trade" (A. 1610). This request was also denied, but a school official wrote on the form, the words "What Trade?" Finally, on September 4, 1968 Parton got the message, requested transfer so as to take "machine shop," which was not offered at Austin, and was granted his transfer (A. 1609). James Dockery was denied a vocational transfer in the summer of 1967, appealed to the school board and lost (A. 1588); yet the following winter he was granted a vocational transfer (A. 1587).

ous panel opinions which affirmed district court orders allowing the continuation of segregated schools on the basis of "district court discretion." *E.g., Robinson* v. *Shelby County Bd. of Educ.*, 467 F.2d 1187 (6th Cir. 1972). For years, such unresolved conflicts among panels of the Circuit concerning the necessity for substantial integration, what constituted "racial balance," etc., left district courts and litigants alike without any guidance except the latest utterance of a panel.[3]

We had hoped that these conflicts, which produced markedly different levels of desegregation in the public schools of Tennessee's major cities (see Petition, p. 12 n.19), would be resolved by the full Court in the first *en banc* considerations of school desegregation cases it had ever scheduled, in the *Mapp* and *Goss* cases. However, in each instance, the Court of Appeals merely affirmed the district court without analyzing the legal issues presented, dismissing any conflict with the "brief answer" that the proof was different in each case (4a). *Mapp* v. *Board of Educ.*, 477 F.2d 851 (6th Cir.), *cert. denied*, 42 U.S.L.W. 3290 (1973); *Goss* v. *Board of Educ.*, 482 F.2d 1044 (6th Cir. 1973). The uncertainty about the legal requirements continues throughout the Circuit.[4] We respectfully suggest that the Sixth Circuit's refusal to establish Circuit-wide standards to end the confusion created by its own decisions in this important

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[3] Thus, for example, the Chattanooga School Board claimed that after an initial ruling in its case based upon *Kelley* v. *Metropolitan County Bd. of Educ.*, 436 F.2d 856 (6th Cir. 1970) and *Robinson* v. *Shelby County Bd. of Educ.*, 442 F.2d 255 (6th Cir. 1971), "[t]he District Court appeared to shift emphasis on the basis of *Goss* v. *Board of Education of the City of Knoxville* [1971] . . ." Brief for Defendant-Appellee and Cross-Appellant, 6th Cir. No. 71-2006, -2007, p. 15.

[4] Indeed, the City of Chattanooga sought to support its request for review by this Court by pointing to the later *en banc* decision in *Goss*. Petition in No. 73-188, p. 12.

area of public law warrants the exercise of this court's supervisory review power. See Rule 19(1)(b) of this Court.

Symbolic of the conflict is the Court's *en banc* ruling in *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir.), *cert. granted*, 42 U.S.L.W. 3306 (1973). It is remarkable that the same Court which contemplated the exchange of pupils, presumably by bus, between Detroit and its suburbs, to effectuate desegregation, also affirmed the continuation of segregation in the much smaller Knoxville system. But this Court's decision in the *Bradley* case on the remedial issue there presented—whether the Court has the power to go beyond the district boundary line—will not settle the issues presented by this case, nor furnish the necessary guidance to other Sixth Circuit litigants in school desegregation actions. Wholly irrespective of the Court's determination in *Bradley*, this cause should be reviewed in order to enforce the commands of *Swann* and the Fourteenth Amendment in Knoxville and throughout the Sixth Circuit.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition for Writ of Certiorari, Petitioners respectfully pray that the Writ be granted.

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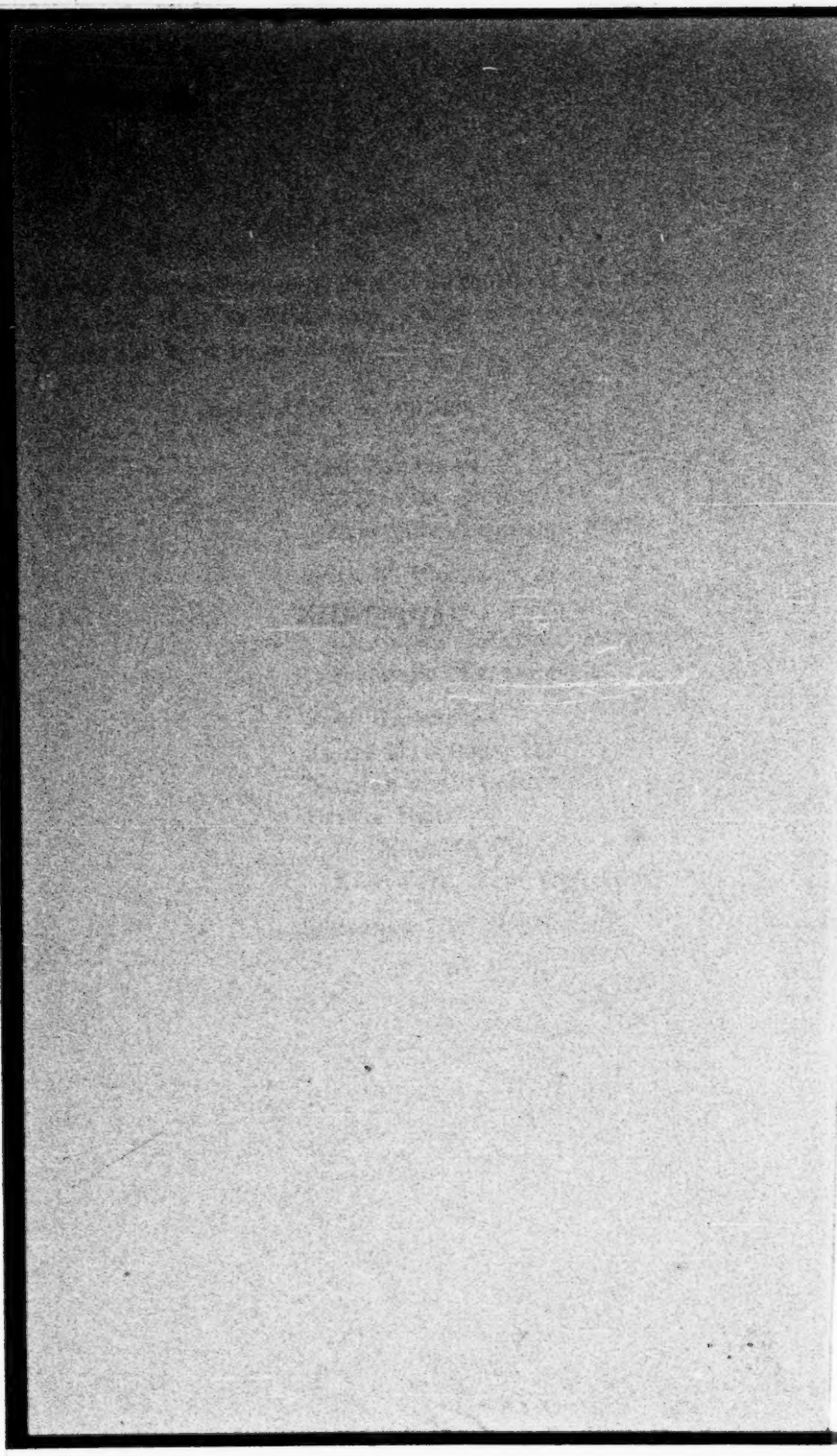
APPENDIX



APPENDIX A

History of School Desegregation in Knoxville

1957 First federal court desegregation action filed

1959 Case dismissed without prejudice on procedural grounds

1960 Present litigation instituted. Board submits grade-a-year plan with minority-to-majority transfer; approved by district court

1962 Initial assignments of students in several elementary grades based on single zone lines; dual zones are maintained for other grades. Court of Appeals approves minority-to-majority transfer

1963 Supreme Court disapproves transfer feature

1964 Plan covers elementary grades. Explicit minority-to-majority transfer discontinued but plan permits "grade requirement" (remain in school previously attended until graduation) and "brother-sister" (go to schools attended by other family members) transfers. Plaintiffs' appeal dismissed on representation of board attorney that "all discriminatory practices" would be eliminated by 1965

1965 Zones established for all grades. Broad transfer provisions continue in effect

1967 District court holds transfer provisions facially valid and finds no gerrymandering of zone lines. 68% of all black students assigned to 9 schools more than 95% black

1968 Board "pairs" formerly black Austin High and formerly white East High but permits transfers to

Fulton for vocational courses, etc. Few white students attend combined Austin-East High School

1969 Court of Appeals affirms district court, holding that attendance patterns without showing of gerrymandering do not establish constitutional violation in formerly dual school system, as in historically unitary system, citing *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967)

1970 In response to plaintiffs' *Alexander* [v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969)] motion, district court holds system "unitary," but criticizes board for failing to keep transfer records sufficient to explain non-attendance of white students at Austin-East complex (320 F. Supp., at 557) and to eliminate overcrowding and underutilization of adjacent predominantly white Rule High and predominantly black Beardsley Jr. High (320 F. Supp., at 556)

1971 Court of Appeals remands for reconsideration in light of *Swann*, recognizing that new standards require reassessment of past holdings and that *Swann* "forbids the use of our decisions in *Deal* . . . to justify a plan of desegregation in a state which employed *de jure* segregation until the *Brown* decision" (444 F.2d, at 639)

1972 After new round of hearings, district court again holds system was unitary despite maintenance of seven all-black schools since neighborhood school zones are reasonably drawn. Court allows board to implement school closings and pairings it proposed after *Swann* remand from Court of Appeals

1973 Court of Appeals affirms district court ruling. 59% of black students assigned to heavily black schools

Supreme Court, U. S.
FILED
JAN 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-661

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Petitioners,

—vs.—

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

Petitioners in this case, presently pending upon their Petition for Writ of Certiorari, file this Supplemental Brief pursuant to Rule 24(5) of this Court, in order to bring to the Court's attention a December 28, 1973 decision of the Court below in another school desegregation case which is inconsistent with the ruling of which review is sought.

We append to this Supplemental Brief a copy of the Sixth Circuit's December 28 opinion in *Newburg Area Council, Inc.* v. *Board of Educ. of Jefferson County, Kentucky*, No. 73-1403. This ruling, involving the sufficiency of school desegregation in Louisville and surrounding Jefferson County, Kentucky, is fundamentally inconsistent with the Sixth Circuit's *per curiam* affirmance in this (*Goss*) case. The conflict in approach and holding, which is never

alluded to in the Court's opinions, typifies the frustration felt by litigants in the States which compose the Sixth Circuit. See *Petitioners' Reply to Brief in Opposition to Certiorari*, at p. 8 n.3. Comparison of the *Goss* and *Newburg, etc.* opinions makes evident the need for this Court to direct the Court of Appeals for the Sixth Circuit to elucidate and apply a consistent set of constitutional principles to the decision of school desegregation cases.

We urge this Court to note the following contrasts, among others.[1] Jefferson County's school population is 4% black (2aa)[2] while Knoxville's is 16.5% black (12a). At the time of trial, Jefferson County operated one all-black school (Newburg) and two other schools respectively 54.3% and 49% black (3aa). The District Court in the Kentucky case found the all-black school not an unconstitutional vestige of previously mandated segregation, citing this Court's comments in *Swann* about "a small number of virtually one-race schools" (4aa). So did the Court of Appeals in *Goss* (3a)—the same Court of Appeals which *reversed* the Kentucky District Court!

What the Sixth Circuit finds significant in both Jefferson County and Louisville, were considered of no importance as indicating the continued existence of a dual system in Knoxville: schools of opposite racial composition within three miles of each other (3aa; *compare* 13a-15a); attendance of a majority of black students in, not all-black, but disproportionately black, schools (3aa; *compare Petition for Writ of Certiorari* in *Goss*, at p. 7); continuation of

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[1] The Kentucky decision also involves issues before this Court in the cases consolidated under *Milliken* v. *Bradley*, No. 73-434, but those issues do not arise in the *Goss* case.

[2] Citations in the form "—aa" are to the Appendix to this Brief; citations given as "—a" are to the Appendix to the Petition, containing the opinions below.

racial identity of pre-*Brown* segregated schools (8aa; *compare* 13a-15a). The District Court's approval of "neighborhood zones" despite continuing disproportionate school enrollments in the Kentucky cases was reversed (9aa) but that in Knoxville (24a, 25a) is affirmed—and the author of the Kentucky decision would have affirmed on the District Court's opinion (6a). Even the Sixth Circuit's traditional reliance upon the discretionary authority of the District Courts (4a-5a; *Robinson* v. *Shelby County Bd. of Educ.*, 467 F.2d 1187 [6th Cir. 1972]) goes by the boards in the Kentucky case (10aa).

Petitioners respectfully submit that these disparate determinations reveal the lack of consistent principles applied in school desegregation cases before the Court of Appeals for the Sixth Circuit (see *Petition for Writ of Certiorari*, at p. 12; *Petitioners' Reply to Brief in Opposition to Certiorari*, at pp. 8-9) and add to the compelling need for review in this case.

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APPENDIX

Nos. 73-1403, 73-1408

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1403
NEWBURG AREA COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al.,
Defendants-Appellees.

No. 73-1408
JOHN L. HAYC , et al.,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed December 28, 1973.

Before: PHILLIPS, Chief Judge, McCREE and MILLER, Circuit Judges.

MILLER, Circuit Judge. This is an appeal from a dismissal by the district court of two class actions concerning school desegregation in Jefferson County, Kentucky. In *Newburg Area Council, et al.*, v. *Board of Education of Jefferson County*, No. 73-1403, the plaintiff challenged certain practices of the

Jefferson County School Board with respect to its elementary schools. Later another action, *Haycraft, et al.*, v. *Board of Education of Louisville, Kentucky, et al.*, No. 73-1408, was filed against the Louisville Board of Education and the Jefferson County Board of Education, seeking the desegregation of the Louisville school system with a plan that included disregarding the Louisville and Jefferson County School District boundaries. The two suits were consolidated but the Court directed separate trials as to the status of each district.

The district court dismissed both actions, holding that the Jefferson County School District and the Louisville Independent School District are unitary systems in which all vestiges of state-imposed segregation have been eliminated. The actions have been consolidated for appeal.

We decide three issues on this appeal: (1) Whether the district court erred in holding that the Jefferson County School District is a unitary system in which all vestiges of state-imposed segregation have been eliminated; (2) whether the district court erred in holding that the Louisville Independent School District is a unitary system in which all vestiges of state-imposed desegregation have been eliminated; and (3) whether a federal district court has the power to disregard school district lines within a single county in formulating a school desegregation plan.

The Jefferson County School District embraces all of Jefferson County except that portion included within the Louisville Independent School District and the Anchorage Independent School District.[1] It has close to 96,000 students, approximately 4% of whom are black. 65% of all students are

[1] The Anchorage School District is a very small school district operating only one elementary school located in the southeast portion of Jefferson County. It is an all-white enclave. The plaintiffs in the *Haycraft* case sought to join the Anchorage School District and its Superintendent as parties defendant. When the district court ruled in a pretrial order that it did not have the power to cross school district lines, it dismissed the proceedings against the Anchorage District and its Superintendent. As we point out later, the Anchorage District must be rejoined in the action.

bussed to the schools they attend. The Board operates 74 elementary schools, 5 middle schools, 18 combined junior and senior high schools, and 6 special schools.

Prior to the decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), the Board maintained a racially-segregated school system in accordance with the requirements of Kentucky law. It did not provide a high school for black students and arranged for their attendance at Central High School, the black high school operated by the Louisville Board of Education. It operated the Newburg Elementary school, grades 1-9. Newburg was located in the one area in the county outside of Louisville having any substantial black population. It was a pre-*Brown* black school, and has remained black until the present day. Newburg is surrounded by a number of all-white or virtually all-white elementary schools. Within a distance of three miles from Newburg, there are, in addition to Price Elementary School, which will be discussed subsequently, nine substantially white elementary schools.

In 1969 Price Elementry School was constructed within a mile of Newburg. When Price opened in 1969-70, 33.1% of the students were black. The percentage increased to 40.2% during 1970-71, to 43.9% during 1971-72, and now stands at 54.3%. It is practically an all walk-in school, with about 3% only of the pupils being bussed.

Cane Run Elementary School is located in the northwest portion of the District close to the Louisville city limits. In 1966-67 the black student population of Cane Run was 1.2%. In 1967-68 it increased to 6.2%, in 1968-69 it increased to 11.5%, in 1969-70 it increased to 25.5%, in 1970-71 it increased to 36.7% and in 1971-72 to 45.5%. In 1972-73 it stood at 49%. Cane Run was rebuilt on the same site during 1972.

The evidence shows that Newburg, Price and Cane Run contain 56% of the black elementary students in the Jefferson County School District.

The district court held that the existence of an all black school, Newburg, in the Jefferson County School District was

not unconstitutional. The Supreme Court stated in *Swann* v. *Charlotte Mecklenburg School District*, 402 U.S. 1, 26 (1971), that the "existence of some small number of virtually one race schools within a district is not in and of itself the mark of a system that still practices segregation."

As this Court noted in *Northcross* v. *Board of Education of Memphis City Schools*, 466 F.2d 890, 893 (6th Cir. 1972), this language in *Swann* is "obviously designed to insure that tolerances are allowed for practical problems of desegregation where an otherwise effective plan for dismantlement of the school system has been adopted." The Jefferson County School District thus has three elementary schools that either are or are rapidly becoming "racially identifiable." As stated, Newburg School, a pre-*Brown* black school, is racially identifiable, while Price and Can Run Schools are rapidly becoming racially identifiable as black school.s .The duty of the school district is to "eliminate from the public schools all vestiges of state-imposed segregation." *Swann, supra*, 402 U. S. at 15. Until the dual system is eliminated "root and branch," *Green* v. *County School Board of New Kent County*, 391 U. S. 430 (1968), the school district has not conformed to the constitutional standard set forth by *Brown* nearly 19 years ago.

The Board urges that "white flight," not school board policies, has been responsible for the shift in the racial composition of the Price and Cane Run Schools. The district court found that the attendance zone for Cane Run had remained constant over the years and that as blacks moved into the attendance area, the school would naturally become "blacker," particularly since whites would "flee." Although the decisions with respect to Cane Run attendance zone and the rebuilding of Cane Run on the same site, considered alone, might not compel the conclusion that the Board fostered segregation here, its decisions with respect to Cane Run must be related to the circumstances surrounding the Newburg and Price Schools.

The evidence shows that in 1969-70 Price opened with an

enrollment of 560 and a capacity of 756. Newburg, with a capacity of 1242 had an enrollment of 620. Although these schools were underutilized, several "racially identifiable" white schools were operating with enrollments greater than capacity using either portable classrooms or operating double shifts. During the 1972-73 school year Newburg's enrollment had declined to 340, and Price's had declined to 620, while some of the nearby "white" schools were operating with over capacity. The district judge found no significance in the underutilization of nearby white schools. Instead he found that the Board was trying to achieve integration in assigning some black students in the area to nearby white schools without determining why white students in the area were not assigned into Newburg and Price. All vestiges of state-imposed segregation have not been eliminated so long as Newburg remains an all black school. Where a school district has not yet fully converted to a unitary system, the validity of its actions must be judged according to whether they hinder or further the process of school desegregation. The School Board is required to take affirmative action not only to eliminate the effects of the past but also to bar future discrimination. *Green, supra,* 391 U. S. 438 n. 4; *Robinson* v. *Shelby County Board of Education,* 442 F.2d 255, 258 (6th Cir. 1971). Since the Jefferson County Board has not eliminated all vestiges of state-imposed segregation from the system, it had the affirmative responsibility to see that no other school in addition to Newburg would become a racially identifiable black school. It could not be "neutral" with respect to student assignments at Price or Cane Run. It was required to insure that neither school would become racially identifiable.

A school system that has had a history of state-imposed segregation has not fully converted to a unitary system when 56% of all of its black elementary students attend three out of seventy-four elementary schools. This is particularly so when these schools are surrounded by several all-white or virtually all-white schools.

The Louisville School District is an independent school district established in accordance with the requirements of Kentucky Revised Statutes 160.160, which provides for independent school districts within a county. It is situated within the City of Louisville, a city of the first-class in Jefferson County, Kentucky, but its boundaries are not co-terminous with the political boundaries of the City of Louisville.[2] Approximately 10,000 children, mostly white, live between the boundaries of the Louisville School District and the outer boundaries of the City of Louisville. The total enrollment of the Louisville School District at the commencement of the 1972-73 school year was 45,570 pupils, of whom 22,367 were white, and 22,933 were black. The trend is definitely toward "white flight." During the 1956-57 school year, there were 45,841 children enrolled of which 12,010 were black and 33,831 were white. Thus, from 1956 to the present time, the white enrollment has decreased by approximately 11,000 pupils, and the black enrollment has increased by the same number.

Prior to the decision in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954), the Louisville Board of Education operated a racially-segregated school system in accordance with the requirements of Kentucky law. The Board put a plan of pupil desegregation into operation at the commencement of the 1956-7 school year. The plan consisted of geographic attendance zones with an open transfer provision. Parents were sent forms to indicate a first, second, and third choice of transfer school. In the absence of a parental transfer request, the pupils were required to attend schools within their assigned zones.

At the commencement of the 1972-73 school year, the Board was operating six academic high schools, thirteen junior high

[2] An independent school district's boundaries do not expand with the boundaries of the city by which it is embraced. Annexation for educational purposes must be considered independently of annexation for the expansion of the city. *Spregens* v. *Thomas*, 308 Ky. 97. 213 S.W.2d 452 (1948).

schools and forty-six elementary schools.[3] Three of the six academic senior high schools, Central, Male and Shawnee, have between 94% and 100% black students. Central was a pre-*Brown* black school. Male and Shawnee were pre-*Brown* white schools. Two of the senior high schools, Atherton and Iroquois, have 97% and 99% white students. The sixth school, Manual, which shares a common attendance zone with Central and Male, has 40% black students. Atherton and Manual were pre-*Brown* white schools, and Iroquois was constructed after 1956.

There are thirteen junior high schools. Five of them, DuValle, Meyzeek, Parkland, Russell, and Shawnee, have between 95% and 100% black students. Four of them, Barrett, Gottschalk, Highland and Southern, have between 94% and 99.5% white students. The remaining four, Manly, Manual, Western and Woerner, have between 25% and 64% black students. DuValle, Meyzeek and Russell were pre-*Brown* black schools; Parkland, Shawnee, Bartlett, Highland, Southern, Manly, Manual, Western and Woerner, were pre-*Brown* white schools. Gottschalk was constructed after 1956.

There are forty-six elementary schools. Nineteen have between 82% and 100% black students. Twenty-one have between 89% and 100% white students. The remaining six have between 16% and 55% black students. The twenty-one schools that have between 89% and 100% white students, were pre-*Brown* white schools.

A large number of racially identifiable schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated. *Swann, supra.* This shifts the burden to the School Board to prove that the racially-identifiable character of the schools is not in any way the product of past or present discriminatory conduct on its part. *Northcross* v.

[3] In addition the Board operates two vocational schools, a residential manpower center in Shelby County Kentucky, and a three-level school for gifted children.

Board of Education of the Memphis City Schools, 466 F.2d 890 (6th Cir. 1972). In Northcross this Court said:

> "It is the defendant School Board's contention that notwithstanding the fact that some 79% of its schools have an essentially monolithic racial structure it has satisfactorily cured the violation of law involved in its past *de jure* segregation and has, in fact, established a unitary school system. We cannot accept this contention."

Id at 893.

Although we are cognizant of the Board's caveat against playing the "numbers game," statistics do provide an invaluable source of information for analysis and comparison. The evidence indicates that over 80% of the schools in Louisville are racially identifiable. As in *Northcross*, the effectiveness of the Board's purported desegregation "can be gauged by a quick look at the vital statistics of the (school) system as it now evists." Id. at 892. An examination of these statistics establishes that five out of the six academic senior high schools, nine out of the thirteen junior high schools and forty out of the forty-six elementary schools are racially identifiable schools. As previously mentioned, fifty-six of the sixty-five academic senior high schools, junior high schools and elementary schools currently operated by the Board were in operation prior to *Brown* as legally-segregated schools.[4] Thirty-five of these fifty-six schools have never changed their racial composition. Regardless of any explanation for the racial composition of any of the other schools in the system, the thirty-five pre-*Brown* schools that have retained their pre-*Brown* racial identification to the present day stand out as clear vestiges of state-imposed segregation. The Board must show that the racial composition of these schools is not the result of past discriminatory action on its part. *Swann* v. *Charlotte-*

[4] The pattern of school construction and site selection since *Brown* has closely followed the "neighborhood school" concept. However, of the nine new schools constructed since *Brown* six were racially identifiable with respect to student composition upon opening.

Mecklenburg Board of Education, supra, 402 U.S. at 26. This it has not done. However laudable their motives and intentions, the Board's desegregation plan has not been effective. Motivation is not the controlling factor. *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). The geographic zone assignment or "neighborhood school system" adopted by the Board, as mentioned earlier, was modified by a transfer provision. Since the pre-*Brown* white schools were generally in white residential areas and the pre-*Brown* black schools were generally in black residential areas, geographic zoning would cause these schools to retain their former racial identification. The transfer provision would enable whites who were assigned to pre-*Brown* black schools to transfer out. It also enabled blacks who were apprehensive about going to pre-*Brown* white schools to return to the black schools with which they were familiar.

The Board urges that changing residential patterns in the Louisville School District has contributed to the continued existence of racially identifiable schools. However, population shifts that changed the racial composition of some schools does not affect the Board's duty to convert fully to a unitary school system. *See Kelly* v. *Metropolitan County Board of Education,* 463 F.2d 732, 744 (6th Cir.) *cert. denied,* 409 U.S. 1001 (1972). This duty has never been fully met.

Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. The measure of any plan is its effectiveness in accomplishing desegregation. *Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971). Because of the residual effects of past discrimination, the Louisville zoning assignment plan has not been effective despite the good intentions of the school board. As the Supreme Court stated in *Swann*:

> "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools near

> est their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. . . ."

402 U.S. at 28.

For the reasons mentioned, we find that the district court erred in holding that the Louisville Independent School District is a unitary system in which all vestiges of state-enforced discrimination have been eliminated.

Intervening plaintiffs, black and white citizen parents, filed complaints seeking desegregation of the Louisville Independent School System, and as part of the desegregation they sought the merger of the Louisville system with the Jefferson County School District and the Anchorage Independent School District, to insure complete desegregation of the entire county. The district court in dismissing the action against Anchorage, stated:

> "Prior to the trial hereof, we entered certain threshold orders, to the effect that this Court lacked the judicial power to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage Schools Districts, and, since the Anchorage School District (a very small school district located in the northeast portion of the county) was totally white, the Court, by final order with respect thereto [dismissed the action as to Anchorage].

The court below relied on *Bradley* v. *School Board, City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), (aff'd — U.S. — (1973) by an equally divided court), in holding that the court had no judicial power to cross political boundaries in this case. The court's reliance on *Richmond* was misplaced. In *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir. 1973), *cert. granted* — U.S. — (1973), this Court held that a federal court is not restrained by state-created political boundaries in formulating a constitutionally acceptable desegregation plan. The present case is clearly distinguishable from *Richmond*. In

Richmond, the rejected desegregation plan involved consolidation of three school systems, even though each district was a unitary system. In the present case, both the Louisville Independent School District and the Jefferson County School District are not operating unitary school systems. *Milliken* involved the power of district courts to disregard state-created school district lines in order to achieve a unitary system in Detroit.

There is nothing so sacrosanct about the school district lines in this case that they may be permitted to curtail the broad equity powers of the federal court in implementing a mandate of the federal Constitution. If it were otherwise the supremacy clause of our fundamental charter would be a dead letter and we would revert to the "state sovereignty" principle of the long discarded Articles of Confederation. The school district lines have been disregarded in the past in conforming to state-enforced segregation. For example, in pre-*Brown* days, black high school students in the Jefferson County system attended Louisville's Central High School on a tuition basis.

The crossing of school district lines in this case involves only a single county, the basic educational unit in Kentucky. Where there are separate school districts in a single county and the districts are not unitary systems, a federal district court may fashion an appropriate remedy without being constrained by school district lines created by state law. *Cf. Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland City Board of Education*, 407 U.S. 484 (1972); *Lee* v. *Macon County Board of Education*, 448 F.2d 746 (5th Cir. 1971).

For the reasons stated herein, the judgments of the district court are reversed. The case is remanded to the district court for proceedings to formulate a desegregation plan for all school districts in Jefferson County, Kentucky. The district court should join all necessary parties including the previously dismissed Anchorage Independent School District. By what-

ever means the district court deems appropriate in the exercise of its equity powers, see *Brown* v. *Board of Education*, 349 U.S. 294 (1955), all vestiges of state-imposed segregation must be eliminated within each school district in the county. To accomplish such purpose, state-created school district lines shall impose no barrier. We do not require use of any particular method nor approve in advance the use of any particular device. Any plan of desegregation is to be effective for the 1974-75 academic year.